Daniel Finley Allen & Co., Inc. *and* Private Sanitation Union Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO

Private Sanitation Union Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO *and* Daniel Finley Allen, & Co., Inc. Cases 29–CA–13287, 29–CA–13515, 29–CA–13539, 29–CA–13572, 29–CA–13683, 29–CA–13802, 29–CB–6939, 29–CB–7066, and 29–CP–533

July 24, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 17, 1989, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent Employer and the Respondent Union filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

[1] Both Respondents except to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Union also excepts to the failure of the judge to recount certain testimony that would be favorable to it. In a case with a record as lengthy as this one, it is not possible to recount all testimony about every incident. We have reviewed all the testimony on which the Union relies. Except for certain additional testimony which we describe below, we adopt the judge's implicit finding that the testimony he did not recount was not critical to deciding the issue before him or his implicit discrediting of that testimony.

We correct the following errors or omissions in the judge's factual findings. Regarding the finding that, in February 1988 (all dates are in 1988 unless otherwise noted), the Employer's supervisor and son of the owner, John Allen, threatened to fire the employees and close the business if the employees had any idea of bringing in the Union, employee Pisan testified that the threat was made to employee Mitchell and himself, and not also to employees Greci and Ham. Regarding the finding that, in late March, replacement employee Suozzo's life was threatened, the judge misquoted Suozzo's credited testimony which was that, a passenger in a car driven by Business Agent Giamona said to him, ''If you don't [walk away] we'll kick the shit out of you. And we'll come to your house and we'll kill you.'' Also, in this incident, Suozzo identified Business Agent Jackson as being in the car, not striking employee Nalley. Regarding the finding that John Allen challenged striking employee Bruning to a fight while Bruning and striking employee Wesselhoft were in a stopped car, we note that Wesselhoft, who was credited regarding this incident, also testified, consistent with the complaint allegation, that Allen also threatened Bruning's family and Wesselhoft's home. Regarding the finding that, in early April at the picket line, John Allen threatened picketer Grisset, we note that striking employee Renzi, whom the judge credited regarding this incident, also testified that Allen also threatened to kill Renzi's father and burn down his house. Regarding the April incident where a picket blocked replacement employee Bretagna's egress through the picket line and claimed to be hit, we note that Business Agent Mastropietro acknowledged that he was the picket involved in the incident. Regarding the finding that, on April 20, strikers blocked a convoy of the Employer's trucks at a gas station, Bretagna did not positively identify striking employee Laster as brandishing the snow shovel. Rather, Bretagna stated it was either Laster or paid picket Grisset. Regarding the finding that, on a Thursday in April, the Union was responsible for a rock thrown at nonstriking employee Karen Donovan, we note that she ultimately did not identify Business Agent Giamona as being present among the strikers, and that the rock passed near her ear, not her car.

[2] In adopting the judge's dismissal of the allegation that John Allen blocked a car driven by Union Business Agent Jackson on March 19, we rely on the judge's implicit refusal to credit Jackson and not the judge's statement that the alleged conduct was ''legally insignificant.'' We adopt the judge's conclusion that John Allen's late March promise to talk to employees (about terms of employment) if they got rid of Union Business Agent Jackson was a violation of Sec. 8(a)(1) because it implied a promise of benefits based on the employees' abandonment of their Sec. 7 rights. We do not rely on any implication that the Employer was obligated to bargain with the Union at that time and amend the Order and notice accordingly.

In adopting the judge's finding that John Allen's early April threat to kill anyone who got in his way was a violation of Sec. 8(a)(1), we find it unnecessary to rely on the judge's statement about Allen's subjective intent in using the word ''kill'' as opposed to the objective effect of the statement on the employee who heard it.

In adopting the judge's findings that the Employer—by John Allen—violated Sec. 8(a)(1) by stealing a briefcase of money and documents from the Union in mid-May, and by dumping garbage in a union car on June 3, we note that there is sufficient evidence from which to infer, and we find, that employees were present during John Allen's conduct.

The Employer excepts to the judge's finding that the Union's October 26, 1988 unconditional offer to return to work was effective. In this regard, the Employer asserts that the Union had no representative status. In *Consolidated Dress Carriers*, 259 NLRB 627, 636 (1981), enfd. in pertinent part 693 F.2d 277 (2d Cir. 1982), the Board adopted the judge's statement of the law that, ''where striking employees have signed union authorization cards, and joined in a strike under union supervision, a general agency is created which empowers the union . . . to offer to return to work on behalf of all the striking employees without obtaining specific authorization from the employees to do so.'' Here, employees who signed authorization cards participated in the strike that the Union supervised. Accordingly, we adopt the judge's finding that the Union's offer to return to work was effective.

In Conclusion of Law 1,e, the judge found that the Employer violated Sec. 8(a)(1) by telling employees that it would never sign a contract with the Union. This conclusion was not supported by underlying credited testimony. We reverse and have deleted this finding from the Order and notice.

[3] Interest on backpay owing the discriminatees shall be computed in accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than *Florida Steel Corp.*, 231 NLRB 651 (1977), cited by the judge.

Employer. The Employer excepts to the judge's dismissal of the 8(b)(7)(C) allegation. In light of the numerous incidents of serious misconduct by both the Union and the Employer, we adopt the judge's conclusions.

As the Board stated in *Massachusetts Coastal Seafoods*, 293 NLRB 496, 498 (1989):

> In determining whether a bargaining order is warranted to remedy the Respondent's misconduct, we apply the test set out in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). There, the Court identified two categories of cases in which a bargaining order would be appropriate absent an election resulting in a union's certification as the employees' bargaining representative. The first category of cases involves ''exceptional cases'' marked by unfair labor practices that are so ''outrageous'' and ''pervasive'' that traditional remedies cannot erase their coercive effects thus rendering a fair election impossible. The second category involves ''less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes.'' In this second category of cases, the Court reasoned that ''the possibility of erasing the effects of past practices and ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . .''

In this case, the Union obtained authorization cards from a majority of employees in the presumptively appropriate unit of all drivers and helpers of the Employer. The Employer's misconduct directed toward this small unit over the course of several months ran the gamut—including threatening to discharge employees or to sell the business if the employees chose representation, threatening to assault or kill striking employees and their families, threatening to damage their property, challenging employees to fights, driving recklessly at employees, promising benefits if the strike was abandoned, and discriminatorily refusing to reinstate employees to their jobs for months after they offered to return to work from what had become an unfair labor practice strike.[4] The Employer's misconduct, if considered alone, could reasonably warrant a bargaining order.[5]

The Employer's misconduct did not occur in a vacuum, however, and we agree with the judge's conclusion that the numerous incidents of serious union misconduct warrant withholding a bargaining order.[6] In adopting the conclusion that no bargaining order should issue, we note, in particular, the judge's finding that, from the inception of the strike, the Union followed a deliberate plan of using cars driven by union business agents and filled with strikers to follow replacement employees and threaten and intimidate them into ceasing working for the Employer. In addition to being planned by the Union, the intimidation of the replacements on the streets of Long Island were unprovoked and as serious as many of the Employer's threats.[7] The Union's systematic intimidation of replacement employees from the inception of the strike is, of course, conduct that belies a good faith pursuit of legal remedies with the Board. Concededly, the Union filed charges in this case, including charges designed to secure the reinstatement of the strikers as against the Employer's retention of the replacements. However, the Union was not content to rely solely on those legal processes. Instead, it carried out a plan of systematically intimidating those replacements in an effort to secure their departure. Accordingly, we affirm the judge's refusal to grant a bargaining order.[8]

[4] Of course, even if the strike was not an unfair labor practice strike, the refusal to reinstate the strikers was unlawful. In this regard, we note that the Employer's replacements were temporary.

[5] Cf. *Avecor, Inc*., 296 NLRB 727 (1989), *F & R Meat Co.*, 296 NLRB 759 (1989). Accordingly, we do not agree with the judge's statement that the Employer's conduct could be considered to fall within the third category of employer misconduct discussed in *Gissel*, misconduct which has only ''minimal'' impact on employee free choice regarding unionization.

[6] *Laura Modes Co.*, 144 NLRB 1592 (1963), *Allou Distributors*, 201 NLRB 47 (1973). In adopting the judge's conclusion, we reject the Union's argument that the judge merely compared the numbers of violations by the Union and the Employer. See *Massachusetts Coastal Seafoods*, supra, cited by the judge, which discusses various factors that the Board considers on this issue, including the union's interest in pursuing legal remedies, evidence that it planned to use violence and intimidation, the extent of provocation of union misconduct, the duration of the union's misconduct, and the relative gravity of the union's misconduct vis-a-vis the employer's.

[7] For example, the Union's threat to kill replacement employee Suozzo was made in the context of the the Union's plan to follow and intimidate. Business Agent Giamona made the threat possible by driving up to Suozzo and made no attempt to disavow the threat after it occurred. The early April threat to beat replacement employee Noia was made in similar circumstances. Union business agents also did not limit their activity to following replacements who were currently engaged in doing work for the Employer. For example, the threat to burn replacement employee Greco's truck was made from Business Agent Kapp's car on a day when neither replacement employee in Greco's truck worked. Moreover, we find that the business agents' tacit approval of the threats made by the strikers in their cars set a pattern followed by strikers, who were being paid by the Union to picket and patrol, to engage in dangerous and threatening conduct on their own.

[8] Contrary to his colleagues, Member Devaney finds merit in the Union's exception to the judge's failure to grant a bargaining order. Although Member Devaney does not condone the violations of the Act by the Union, he does not agree with his colleagues that the circumstances here warrant the extraordinary measure of withholding a bargaining order. Initially, he finds, in agreement with his colleagues, that the Employer's conduct, standing alone, would warrant the issuance of a bargaining order. In so finding, Member Devaney emphasizes that the Employer's violations extended over a period from some 4 months prior to the commencement of the strike to several months after the Union made an unconditional offer to return to work on behalf of the strikers, and that the Employer's unlawful conduct included several acts of violence against the strikers and union supporters. Nevertheless, his colleagues conclude that the Employer's conduct did not occur in a vacuum and that based on the Union's misconduct, the withholding of a bargaining order is warranted. In disagreeing with his colleagues' conclusion, Member Devaney notes that in contrast to the Employer's unlawful conduct, the violations attributable to the Union were for the most part limited in time to within several weeks of the strike's commencement and included no acts of physical violence of the type

Continued

Regarding the 8(b)(7)(C) allegation, the Union began picketing for recognition on March 19. It filed a representation petition on April 15, after 28 days of picketing. Although the Board has generally defined a ''reasonable period of time'' in which a union must file a petition as 30 days, we note that the time considered ''reasonable'' can be shortened by misconduct such as that committed by the Union in this case.[9] We do not think it is appropriate, however, to shorten the time considered reasonable for picketing where, as here, the Employer committed numerous serious unfair labor practices in the same period. Accordingly, we affirm the judge's dismissal of this allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that

A. Respondent Daniel Finley Allen & Co., Inc., Hicksville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(d) and 1(e) and reletter the subsequent paragraphs.

2. Substitute the attached Appendix 1 for that of the administrative law judge.

B. Respondent Union, Private Sanitation Union Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

committed by the Employer and condemned in *Laura Modes Co.*, supra, 144 NLRB 1592, and its progeny. Member Devaney would find, therefore, that the Union's filing of the petition after the strike began, together with its refraining from unlawful conduct after the initial period of the strike, evidenced the Union's good-faith intention to use the Board's processes and that it was the Employer's serious and pervasive unlawful acts occurring over a substantial period of time that made the holding of a fair election impossible. Accordingly, Member Devaney would grant a bargaining order.

[9] *Laborers Local 1184 (NVE Construction)*, 296 NLRB 1325 (1989). *Retail Wholesale Union (Eastern Camera)*, 141 NLRB 991 (1963).

APPENDIX 1

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to discharge our employees or threaten to sell our business if our employees select Private Sanitation Union Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or any other union as their bargaining representative.

WE WILL NOT threaten to discharge our employees if they engage in a strike.

WE WILL NOT promise benefits to our employees in order to induce them to abandon a strike.

WE WILL NOT threaten to assault or kill our employees or their families.

WE WILL NOT threaten to assault union representatives in the presence of employees.

WE WILL NOT threaten to cause damage to the cars, homes, or other property of employees or their families.

WE WILL NOT attempt to provoke fights with employees or union representatives in the presence of employees.

WE WILL NOT assault employees or union representatives in the presence of employees.

WE WILL NOT bump into, spit at, throw coffee at, or throw garbage at employees, union representatives, or other persons in the presence of employees.

WE WILL NOT drive vehicles in a reckless manner so as to threaten physical harm to employees or union representatives.

WE WILL NOT grab hold of or take away property belonging to union representatives and employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL to the extent that we have not already offered reinstatement to the strikers, offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all the strikers for any loss of earnings and other benefits suffered as a result of the discrimination against them since October 26, 1988, with interest.

DANIEL FINLEY ALLEN & CO., INC.

Rhonda Schechtman Esq. and *Elizabeth Orfan Esq.*, for the General Counsel.

Robert Ziskind Esq., for the Company.

Eugene Eisner Esq. and *Shaila T. Stewart, Esq. (Eisner, Levy, Pollack & Ratner)*, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. These cases were tried before me on various dates in October, November, and December 1988 and January, February, and March 1989.

The charges in Cases 29–CA–13287, 29–CA–13515, 29–CA–13539, 29–CA–13572, 29–CA–13683 and 29–CA–13802 were respectively filed on November 18, 1987, April 21, May 6, June 6, September 23, and November 22, 1988. Various complaints and consolidated complaints were issued in the above series of cases on December 1987, July 29, December 29, and September 23, 1988.

The charges in Case 29–CB–6939, 29–CP–533, and 29–CB–7066 were filed on April 28 and October 20, 1988. Complaints based on those charges were issued on July 29 and November 18, 1988.

The allegations made against the Employer in the CA cases are as follows:

1. That on or about November 9, 1987, the Employer by John Allen threatened and physically assaulted union representatives, and that he confiscated pamphlets and other materials belonging to the Union.

2. That in December 1987 the Employer by John Allen, threatened employees with discharge and bodily injury if they signed union cards.

3. That in December 1987 John Allen told employees that it would be futile to select the Union because the Employer would not negotiate or deal with it.

4. That in January or February 1988, John Allen, near George's Deli, prevented his employees from talking with and receiving literature from union representatives.

5. That in January or February 1988, John Allen, near George's Deli, threatened his employees with discharge and threatened to close the business if employees signed union cards or otherwise supported the Union.

6. That in February 1988, John Allen, at the Port Washington Dump, threatened employees with discharge if they signed union cards or if they supported the Union.

7. That in early March 1988, John Allen warned and directed his employees not to sign union cards.

8. That on or about March 19, 1988 John Allen blocked the movement of a vehicle carrying union representatives and employees and caused physical damage to the motor vehicle.

9. That on or about March 20, 1988 John Allen interrogated striking employees regarding their membership and activities for the Union and threatened the employees with discharge.

10. That in late March 1988, John Allen threatened striking employees with arrest and threatened to inflict harm to their persons, relatives and property.

11. That in late March 1988, the Employer by Daniel Allen, in Roslyn Heights, prevented union representatives and striking employees from engaging in ambulatory picketing and attempted to cause their arrest.

12. That on or about March 30, Daniel Allen threatened employees with bodily harm.

13. That at the end of March or the beginning of April 1988, John Allen promised employees unspecified benefits in order to induce them to abandon their membership in and activities for the Union.

14. That on or about April 4, 1988, John Allen in Searingtown, New York, threatened and assaulted union representatives in the presence of employees.

15. That in the beginning of April 1988, John Allen at an employee's home in Hicksville, New York, offered him a wage increases, threatened him with bodily injury, threatened damage to his automobile and told him that it would be futile to select the Union as the bargaining representative.

16. That in the beginning of April, John Allen, on the Employer's Manhasset Hills route, in the presence of striking employees, attempted to cause damage to a vehicle driven by union representatives; blocked the movement of the vehicle; physically assaulted union representatives and striking employees; threatened to inflict bodily harm on employees and their relatives; and threatened to discharge employees if they spoke with union representatives or striking employees.

17. That in the beginning of April 1988, John Allen near the Hicksville Railroad Station, blocked the movement of a vehicle driven by striking employees and threatened the employees with unspecified reprisals.

18. That in the beginning of April 1988, John Allen threatened a striking employees with bodily harm and with damage to his property.

19. That during the week of April 11, 1988, John Allen and Daniel Allen, separately on two occasions on Miller Road in Hicksville, attempted to inflict injury to the persons and automobiles of striking employees.

20. That on or about April 12, 1988, John Allen on Pearl Street, in Westbury, New York, threatened to inflict injury to the persons, property and relatives of striking employees.

21. That on or about April 12, 1988, John Allen on Duffy Avenue in Hicksville, attempted to inflict bodily injury on striking employees.

22. That in mid-April 1988, John Allen on Miller Road, in Hicksville inflicted damage to an employee's automobile and threatened an employee with bodily harm.

23. That on or about April 23, 1988, John Allen, at the intersection of Route 107 and Old Country Road., Hicksville, in the presence of striking employees, threatened to inflict damage to the property of relatives of striking employees.

24. That on or about April 26, 1988 John Allen, at Miller Road, Hicksville attempted to inflict damage to the person and automobiles of striking employees.

25. That at the end of April 1988, John Allen attempted to cause damage to the person of union representatives and striking employees, and attempted to cause damage to a vehicle driven by union representative.

26. That in mid-May 1988, John Allen at Ketchun Avenue and Miller Road, Hicksville, confiscated property belong to the Union including various records.

27. That a strike which commenced on March 19, 1988 was an unfair labor practice strike, caused and prolonged by the unfair labor practices alleged above.

28. That the conduct of the Employer described above, made a fair election impossible and therefore, the Employer should be ordered to bargain with the Union which, on March 18 had obtained authorization cards from a majority of the employees in a unit consisting of :

> All drivers and helpers employed by Respondent at its Hicksville, New York facility, excluding all other em-

ployees, office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

29. That since October 27, 1988, the Employer has refused to reinstate striking employees who, through the union, made unconditional offers to return to work on October 26, 1988.

The allegations made against the Union in the CB and CP cases are as follows:

1. That on March 19, 1988, the Union in furtherance of a demand to be recognized as the bargaining representative of the employees, established a picket line outside of the Employer's premises at 140 Miller Road, Hicksville, New York.

2. That the Union, on April 15, 1988, filed a representation petition in Case 29–RC–6979 requesting an election in the unit described above.

3. That notwithstanding the filing of the petition for an election, the Union because of the various acts and conduct described below had, prior to the filing of the petition, picketed for more than a reasonable period of time without a valid petition having been filed under Section 9(c) of the Act. It therefore is contended that such picketing violated Section 8(b)(7)(C) of the Act.

4. That the Union, in late March 1988 attempted to inflict damage to the persons and property of nonstriking employees.

5. That on or about March 21, 1988, on the Employer's Searingtown route, the Union damaged a truck owned by the Employer and threatened to inflict damage to the persons and property of nonstriking employees.

6. That on or about March 22, 1988, the Union prevented the movement of the Employer's vehicles.

7. That on or about March 24, 1988, the Union on Kent Street on the Employer's Herricks route, threatened and attempted to inflict bodily injury to employees of the Employer.

8. That on or about March 29 or 30, 1988, the Union on the Employer's Albertson route, threatened nonstriking employees with bodily injury.

9. That on or about March 30, 1988, the Union at the North Hempstead dump, attempted to damage the Employer's vehicles.

10. That in late March 1988, the Union threatened to inflict bodily injury to nonstriking employees.

11. That at the end of March 1988, the Union, on the Long Island Expressway and on Deer Park Road, threatened nonstriking employees with damage to their persons and property.

12. That at the end of March and in early April and at the end of April 1988 the Union, on the Employer's East Williston route, threatened nonstriking employees with bodily injury.

13. That in March, April, and May 1988 on almost a daily basis, the Union, at or near the Employer's premises and at other locations threatened nonstriking employees with physical harm.

14. That in April 1988, the Union on various occasions blocked the movement of the Employer's vehicles and the vehicles of nonstriking employees.

15. That on or about April 15, 1988, on Miller Road, the Union damaged vehicles of nonstriking employees.

16. That in the third week of April 1988, the Union physically assaulted nonstriking employees and caused damage to their property.

17. That on or about April 20 or 21, 28, and 30, 1988, the Union, on Miller Road, at or near the Employer's facility, attempted to inflict injury to the persons and vehicles of nonstriking employees.

18. That on or about May 2, 1988, the Union damaged the property of nonstriking employees and attempted to inflict bodily injury to them.

19. That in May, on various occasions, the Union at or near the employer's facility on Miller Road, attempted to inflict, threatened to inflict and did inflict, damage to the persons and property of nonstriking employees, and representatives of the Employer.

20. That on or about June 3, 1988, at the Employer's facility, the Union inflicted bodily injury on the representatives and supervisors of the Employer.

21. That on or about September 1, 1988, at the intersection of Miller Road and Twinlawns Avenue, Hicksville, the Union assaulted representatives of the Employer, blocked the movement of an Employer's vehicle, and threatened such representatives with bodily harm.

I. BACKGROUND

For at least 10 years the Union has from time to time engaged in organizational activity at the company.

In 1984 Region 29 of the NLRB issued a complaint in Cases 29–CA–10894 and 29–CA–10930 wherein it was alleged that the employer engaged in interrogation, threats of discharge and plant closing, and gave the impression that it was surveilling its employees union activities. It was alleged that this conduct occurred during an organizational drive in 1983. Thereafter, a settlement agreement containing a nonadmission clause was signed in February 1986.

On March 31, 1987, the company entered into a formal settlement agreement, providing for the entry of a court order, in relation to another unfair labor practice charge filed by the Union. (Case 29–CA–12488.) This settlement (which also contained a nonadmissions clause), related mainly to an allegation that in June 1986 the company, by John and Daniel Allen, threatened and assaulted Carmella Cruz, who was attempting to speak to and distribute literature to the company's employees.

II. OPERATIVE FACTS

A. *The CA Cases*[1]

I note at the outset, that both John and his brother Daniel Allen were extremely unpersuasive as witnesses. Both were excessively hot tempered, evasive and argumentative and I was not impressed with their demeanor. As a general rule, unless either of their versions of an event is independently corroborated by a reliable source, or is undenied by the other side's witnesses, or is inherently improbable, I shall not credit their accounts. I should also note here that I also believe that some of the Union's witnesses were guilty of exaggeration.

[1] I shall deal with the issues relating to the reinstatement of the strikers in a different section of this decision.

In November 1987 the Union resumed its organizational activities at the company. On or about November 9, Business Agent Sylvester Needham and trustee Carmella Cruz, approached a few of the employees at Willets Road and introduced themselves. According to Cruz, when John Allen drove up in his truck, he came over and started cursing at Needham. Cruz states that John Allen called Needham a black son of a bitch and threatened to kill him. According to Cruz, when Allen spat on Needham, Needham cocked his fist but did not throw a punch. Cruz further states that Allen grabbed his briefcase and threw it.

Needham testified that when Allen approached, he said to leave his men alone, grabbed the leaflets out of Needham's hand and ripped them up. Needham states that Allen pushed against him with his chest and said, ''I'm going to get you guys.'' At this point, according to Needham, Allen spit on him and when he was about to hit Allen, Cruz told him to back off which he did. Needham also states that Allen went over to his car, took the keys out and threw them into the shrubs.

Dexter Mitchell, an employee testified that he was present at this incident and that when Allen approached the employees that had been talking to the union agents, he told them to get rid of the union papers or else they would be fired. He states that he saw that Sylvester Needham and John Allen wound up spitting at each other, with John Allen yelling that Needham should leave his workers alone. There were no other witnesses to this event who corroborated the alleged discharge threat.

Ralph Semonella, another employee, testified that he saw the tail end of this incident; that he saw papers on the ground with John Allen and Sylvester Needham standing nose to nose. He states that at one point he saw Needham grab Allen by the shirt and cock his fist.

John Allen testified that when he saw the union people handing out literature to his employees he ran over to see what was happening. He states that he was handed some pamphlets and threw them into the air. According to Allen, Needham got very irate and began spitting at him. Allen states that Needham grabbed him by the throat and drew back his fist, but did not throw a punch. John Allen denies that he spit at Needham, that he threatened to kill anyone, that he threw keys away, or that he knocked over anyone's briefcase.

Kevin Pisan, an employee supporter of the Union, testified that about a few days after the Willets Road incident, (described above), he overheard John Allen tell employee Larry Fells to lie to the police regarding what happened during that incident. According to Pisan, when Fells said that he would not lie to the police, John Allen fired him. This was denied by John Allen, but more significantly, not corroborated by Fells who was not called as a witness. Also, there is no allegation in the complaints alleging that the company discharged Fells.

Pisan testified that about a week after the Willets Road incident, John Allen told a group of about 19 employees in the company's yard that; ''Anybody who thinks about getting the Union down into my yard, we will fire him. Either that, or close the doors.'' Dexter Mitchell, another employee supporter of the Union testified that in November 1987 soon after the Willets Road incident, John Allen told a group of employees in the yard that they should not mess with union guys or they would be fired. John Allen denied this allegation.

According to employee David Wesselhoft, in December 1987, he was at the dump with John Allen who said that he opposed unions and never wanted one in the company. He states that Allen further stated that he would fire anyone who was involved in a union or beat them up.

Kevin Pisan testified that in February 1988 he was at the dump with Dexter Mitchell when Cruz came over to hand out union literature. He states that soon thereafter, employees Mario Greci and Alexander Ham also pulled into the dump whereupon Cruz went to talk to them. According to Pisan, after John Allen also arrived at the dump, and saw Cruz talking to the employees, he came over and said to Pisan and Mitchell that if we had any idea of bringing in a union, he would fire us all and close the yard. Mitchell, who was called as a witness was not asked to and did not corroborate this allegation which was denied by John Allen.

Kevin Pisan also testified that in late January or early February 1988, he was at George's Deli with employee Mario Greci when two union agents came over to their truck to pass out pamphlets. He states that John Allen came by and yelled at the union agents to get off his truck. According to Pisan, Allen then said that if the yard went union he would close it down ''or something to that effect.'' This was not corroborated by Greci and was denied by John Allen.

On or about March 16, 1988, Dexter Mitchell called the Union and spoke with Martin Edelstein. As a result, Edelstein sent Business Agent Needham to meet with employees the next day at Reinhardt's bar. On March 17, Needham did meet with employees Anthony Marino, Kevin Pisan, Larry Laster, and Mario Greci, all of whom expressed an interest in joining the Union. (Marino, Greci, Laster, and Pisan signed union authorization cards on March 17.)[2]

On March 18, 1989, the Union held a meeting with many of the company's employees at Reinhardt's bar. Edelstein states that at the meeting he reviewed the prior unfair labor practice history with the company including the pending charges involving the incident with Needham back in November 1987. The employees were told of the mechanics of obtaining recognition and there was a discussion as to the pros and cons of filing for an election as opposed to going on strike if the employer refused to grant recognition on request. In this regard, it was decided by the employees to forego an election, to ask for recognition the following day and to engage in a strike in the event recognition was refused. According to employee Michael Renzi, the employees decided to go on strike because they thought that if there was an election, the company would fire the employees one at a time.

At the meeting on March 18, the following employees signed authorization cards for the Union:

David Phillips	Raymond Furline
Alexander Ham	George Nalley
Patrick Bruton	Mike Renzi

[2] The authorization cards state: ''I hereby designate Private Sanitation Union Local 813 . . . as my collective bargaining representative, hereby revoking any and all applications for membership or collective bargaining authorizations which I may have heretofore given any labor organization or anyone else. I understand that if enough cards are signed the Union may seek and become the collective bargaining agent at the plant without an election.''

Richard Cranmer	Dexter Mitchell
Dennis Lettis	David Wesselhoft
Michael Donovan	Peter Bruning
Jason Farrel	Christian Harris

On the following day, employees James Talton and Ralph Semonella also signed cards. Thus, as of March 19, 20 of the company's employees had signed cards authorizing the Union to represent them. This constituted a large majority of the company's work force.[3]

On Saturday morning, March 19, the Union's representative Sylvester Needham confronted John Allen and demanded recognition in a unit of drivers, helpers, mechanics, and yardmen. When this demand was refused, the employees named above commenced a strike which lasted for almost a year. The picket signs initially used by the Union read:

ULP
WORKERS OF DANIEL ALLEN
ON STRIKE
REFUSAL TO RECOGNIZE

From almost the inception of the strike, the Union made a practice of following the company's trucks on their routes. While some of the Union's witnesses testified that this was done merely to survey the routes and see how fast the company was able to pick up garbage during the strike, it is quite clear to me that the real purpose was to ask customers to stop using the company's services and to ask replacements to stop working. To a large extent, the allegations of both sides arise from confrontations that occurred in this context as well as at the entrance of the company where picketing was carried out. Needless to say, each side puts most of the blame on the other, and in some cases the principal contention is that the other fellow started it first.

According to Union Business Agent Jerome Jackson, on the morning of March 19, he was driving a group of three striking employees to get coffee. He states that when he pulled to a stop on Miller Road, John Allen drove his truck around the car and cut him off. He states that when he tried to go around Allen's truck, Allen went in front of Jackson's car, forcing him to stop and slammed his hands on the front hood. Jackson states that Allen yelled something but that he could not hear it because the windows were up and the radio was on. In my opinion this incident is legally insignificant and it was not corroborated by any of the strikers.

According to James Talton (a striker), on Sunday March 20, he was driving Anthony Marino home when he encountered John Allen in his car. He states that John Allen asked ''you're one of them now.'' (Actually it is not clear to me from Talton's testimony if Allen made this a question or simply made this as a statement.) According to Talton, he responded that he signed a card; that he had no choice. He states that Allen then said ''you no longer work here.'' (It is not alleged in any of the complaints that Talton was discharged.)

In support of the allegation that the company enlisted the police to interfere with the union's use of ambulatory picketing and leafleting activities, Business Agent Marcello Mastropietro testified that while he and employee Alexander Ham were on the company's routes they came on two of the company's trucks which were collecting refuse side by side. He states that after the arrival of another union agent's car on the scene (Ricky Merola's), three police cars showed up and one of the officers demanded that the union agents turn over their car keys. Mastropietro testified that after a while, the officer who took the keys gave them back, told them that it was against the law to follow the trucks and also told them that they were lucky that Daniel Allen was not filing charges for harassment.[4]

David Wesselhoft (a striking employee), testified that at the end of March he and employee Peter Bruning (a/k/a ''Skin''), were driving on the Long Island Expressway. He states that at one point when he stopped, John Allen came over and claimed that we were following a car driven by one of the strike replacements. According to Wesselhoft, John Allen grabbed Bruning and challenged him to fight. (Both Bruning and Allen are big men physically.)

In relation to the above, John Allen testified that on one occasion he was following one of the replacements home and saw that Wesselhoft and Bruning were behind him. He states that he got out of his truck and asked them what the hell they were doing and told them to leave me and his men alone so that they could get their work done. He denies that he assaulted Bruning, or threatened either man.

Michael Renzi (a striking employee) testified that on an occasion at the end of March, he tried to talk to replacements as they were leaving the yard and going home. Renzi states that when a green Grand Prix (driven by Walter Maislin), came down the driveway he attempted to talk to the driver, whereupon the driver put the car in reverse, went back up the driveway and hit the fence. When he hit the fence a second time, a piece broke off and knocked John Allen to the ground. According to Renzi, Allen then told the driver to leave and said to the assembled pickets that he was going to have them all arrested.

Dennis Lettis, another striking employee, testified that after John Allen was hit with the piece of fence, he saw the driver get out of the car and begin swinging a chain while Allen yelled at Renzi that he was going to get him arrested and fired.

Dexter Mitchell's version of the above event was that when John Allen came down the driveway, he called Mitchell a ''nigger'' and told the driver to get out of there.

Walter Maislin testified that a few days prior to the incident described above, he was with Donald Carmen on a route (the Albertson route), when he was approached by

[3] The payroll records for the week ending March 18 show 26 names. However it was stipulated that Todd Colombo was terminated on March 11, 1988, that George Middlebrook last worked at the company on March 12, 1988, and that Michael Donovan was on workman's compensation as of that week.

Including Donovan in the unit, as of March 19, 20 out of 24 bargaining unit employees had signed authorization cards. In this connection, Christian Harris, Richard Cranmer, and Patrick Bruton testified that they filled out their cards at the meeting on March 18 but did not turn them in for about a week thereafter. (The cards of these three individuals are dated March 18, 1988.)

[4] As part of the CB cases against the Union, the General Counsel produced evidence that from the inception of the strike, the Union made a practice of following the company's trucks. She also produced evidence that the union's activity was not quite so benign. Thus, as more fully discussed below, evidence was adduced as to threats of violence by strikers against replacements who worked on the trucks, as well as incidents where the union's cars physically impeded the progress of the company's trucks on their pickup routes. It was undisputed that soon after this activity commenced, the company hired a protection agency that followed the trucks in an attempt to ensure their safety.

Mike Renzi and either Alexander Ham or Dexter Mitchell. He states that Renzi said that he (Maislin) was taking a job away from him and that the black striker said that he would kick ''my ass'' if he continued to work. Maislin testified further that as he walked toward the truck, Renzi brandished a tire iron and said that he better not work or he would kill him. To a large extent Maislin's testimony was corroborated by Donald Carmen who identified the black man as Dexter Mitchell. Carmen is a son-in-law of Sarah Allen, the owner. (In his pretrial affidavit which described this incident, Maislin did not mention that Renzi allegedly brandished a tire iron.) In any event, Maislin testified that on the occasion that he drove his car down the driveway, Michael Renzi yelled at him while at the same time reaching into his car. Maislin states that he then backed his car up the driveway, banged into the fence which broke and hit John Allen. He states that Allen told him to leave, whereupon he drove down to Miller Road, got out of his car and took out a bicycle chain.

Charles Davis, a former employee of the Company testified that on or about March 30, 1988, he received a phone call from Daniel Allen who said that Dexter Mitchell and D'Angelo Grisset[5] were chasing him with guns and knives; that they were messing with his family and that if they continued, he (Allen), would mess with Davis' family too. (Dexter Mitchell, an employee was at this time, living at the home of Davis and was the latter's daughter's boyfriend.) Daniel Allen denies making any threats to Davis.

Striker Mario Greci testified that in early April John Allen came to his home and said that if he would return to work, Allen would give him double pay. According to Greci, John Allen said that he did not want to have anything to do with the Union, that he would never sign a contract and would rather sell everything than go union. Greci asserts that Allen said that he would kill anyone who got in his way and then said that Greci had a nice car and did not want to see anything happen to it. John Allen concedes that he went to Greci's house but denies all the threats and denies that he made any promises to induce Greci to return to work or to abandon the Union. He states that he is a personal friend of Greci who came to his wedding.

In or about April 4, Business Agents Marcello Mastropietro and Micky Giamona along with strikers David Wesselhoft, Alexander Ham and Anthony Marino were out on the routes following the company's trucks when they caught up with a truck driven by John Allen at Shrub Hollow Road. (A deadend road.) According to Mastropietro, Allen blocked the road with his truck and then came over to Giamona's car and said to Giamona, ''I know you carry a gun, I can carry one too, I'm going to get you.'' (However, in a pretrial affidavit, Mastropietro asserted that Allen said, ''I know you are carrying a gun and I can carry one too''.) Mastropietro states that when he asked Allen to move the truck, he refused whereupon he (Mastropietro), went over to a house and asked a woman to use her phone. He states that after being given a phone, John Allen came over, threw the phone into the house, told the woman that she owed him $1000 and would get her for allowing him to use the phone. According to Mastropietro, John Allen spit in his face and said that he knew where his family lived and he was going to kill us. He states that when he did not respond, Allen asked ''why don't you hit me.'' Mastropietro testified that when the police arrived, Allen said that we were threatening him and his helper. Mastropietro states that the officer told the union people that they should not be there and that it was against the law to be following the trucks.

Anthony Marino's version of the above was that he and Mastropietro had been following Allen's truck for about 10 to 15 minutes when they arrived at the dead end street and John Allen blocked them from leaving. Marino testified that Allen asked why we were following him and said that he was going to call the cops. According to Marino when Mastropietro went to get a phone, Allen followed him grabbed the phone, threw it into the house and spit in Mastropietro's face.

David Wesselhoft testified that after John Allen used his truck to block the union's cars, Allen yelled something at the strikers. He states that he saw John Allen throw a phone into a house and spit at Mastropietro. He also states that when the police arrived, they said that the union could not follow the trucks and that they had gotten a lot of complaints from the Allens about the strikers following the company's garbage trucks.

John Allen testified that Mastropietro and Wesselhoft had been following him on the route in a blue Cutlass. He states that he backed up the truck on Shrub Hollow road so as to block them into a driveway. According to Allen he told Micky Giamona that he knew Micky had a gun and that he could get one too. Allen denies making any threats, taking the phone away or having any words with a home owner during this incident.

Striker Dennis Lettis testified that in early April, he was driving with Dexter Mitchell near the railroad station in Hicksville when John Allen cut him off with his car. He states that Allen said that if anything happens to any of his replacements, ''I'll take care of you guys.'' Mitchell testified that on this occasion, Allen said that ''you better leave my workers alone or else I'm going to get you.'' Mitchell states that he gave Allen a succinct retort of ''f—k you.''

John Allen's version is that as he was driving to work, Lettis drove his Chevette in front of him and that when he (Lettis), stopped his car, Mitchell came out with a billy club and said he was going to kill me.

Sometime in April, Union Agent Jerome Jackson was with strikers Alexander Ham, D'Angelo Grisset, and Mike Renzi at the Breakaway delicatessen when John Allen came in and made an ironic expression of affection to Jackson. According to Jackson (and essentially corroborated by Renzi), when the employees asked Allen why he did not just sign a contract with the Union, Allen responded that he would talk to the men if they got rid of Jackson.[6]

John Allen denied that he made any promises to the employees at the Breakaway Delicatessen.

According to Business Agent Jerome Jackson, in April he followed company trucks usually with Kevin Pisan, Mike Renzi, or D'Angelo Grisset. On a particular occasion in

[5] Although there was evidence that a person named D'Angelo Grisset participated in the picket line activities of the Union, the evidence does not establish that he was an employee of the company at the time the strike commenced.

[6] It also was alleged that John Allen took Grisset outside and told him that if he left the strike line, he would not contest his unemployment claim. The testimony by Jackson in this regard was, however, hearsay and was not corroborated by Grisset who did not testify in this case.

April, Jackson states that John Allen, after making a left turn, all of a sudden backed up his truck so fast that Jackson had to back up his car in order to avoid being hit. (According to Jackson, he and Allen were backing up the street at 40 mph.) Jackson states that after the vehicles stopped, John Allen came over and yelled ''hit me,'' and Jackson states that he would have, had not the other employees restrained him. According to Jackson, Allen took the strike signs off the car, put them into the garbage hopper and said to Grisset; ''One day its just going to be me and you buddy.'' According to Jackson, when the police arrived, they told him to stay at a distance from the trucks and not to get too close.

Kevin Pisan testified that prior to the rearward race, John Allen came over to the car and told him he was going to give Pisan's mother a heart attack and put her back in the hospital. According to Pisan, when Allen backed up the truck, Jackson backed his car up and put it into a driveway whereupon Allen blocked the driveway with his truck. He states that when Allen and Jackson got out, Allen pushed against Jackson with his chest. According to Pisan when the police came they told Allen to calm down or they would lock him up.

Mike Renzi stated that he was with Jackson and Pisan following John Allen's truck and trying to talk to the replacement employees. He testified that Allen drove at them in reverse at about 40 to 45 mph. According to Renzi, Allen told them that they were not supposed to follow the trucks and that he would have them arrested. Renzi also states that during this incident Allen said that he was going to give Pisan's mother a heart attack and kill her. Renzi states that the police told Allen to calm down and told the strikers to stop following the trucks for the reset of the day. According to Renzi, when Jackson said that they had the right to follow the trucks, the police officer said that he would appreciate it if they did not.

John Allen testified that the above incident occurred during the first week of the strike. He testified that while he was driving a garbage truck, he was followed by a car containing Jackson, Renzi, Pisan, and Grisset who were threatening to break the legs of the replacement employees who were with him. Allen states that while this was happening, he called his mother over the radio and asked her to call the police. According to Allen when the police came, the union's car disappeared. He states that this was repeated on several occasions on this route. Allen states that as the day went on he was getting more and more outraged because the strikers were harassing the new employees and he could not get the work done. He states that at Nottingham Drive, he backed up his truck with Jackson's car behind him and drove Jackson into a driveway where he blocked the car. At this point, according to Allen, everyone got out of their vehicles and there was a great deal of cursing going back and forth. He states that six police cars finally showed up and separated him from Jackson who were chest to chest while cursing at each other.

In a related fashion, a number of the Union's witnesses testified that John Allen used his truck in a threatening and unsafe manner vis-a-vis the strikers. Thus the following incidents were described, all of which were denied by Allen:

1. Mario Greci testified that in April when he was driving with Ralph Semonella, John Allen as he was driving in the opposite direction, swerved into Greci's lane and crossed the double yellow line. John Allen testified that on one occasion he came close to Greci's car but did not cross the line. He states that Greci accused him of crossing the double line and making him veer off the road.

2. Greci testified that on another occasion in April, John Allen as he was leaving the company's driveway, cut the corner so close that he missed Greci's parked car by about 6 inches.

3. Michael Renzi testified that on one occasion in April when he was with Jackson following a company truck, John Allen as he was driving in the oncoming lane, crossed over into their lane and forced them onto the curb.

4. Kevin Pisan testified that on an occasion in April he was driving down Miller Road when John Allen driving his truck in the oncoming lane, crossed over to Pisan's lane and began blowing the truck's air horns.

5. David Wesselhoft testified that on an occasion during the spring of 1988, John Allen drove toward him in a swerving pattern that caused him (Wesselhoft) to go off the road.

Dennis Lettis testified that on or about April 12 he and Kevin Pisan were standing with Dexter Mitchell outside the latter's house when John Allen drove over and told Pisan that he was going ''to take care of you, your wife and kid.'' He states that after making a similar threat to Mitchell, Allen drove down the street, turned around and drove back at them fast. As to this incident, Mitchell testified that Allen yelled at Pisan that he was going to burn his house down, that he threatened to kill Pisan's family and that he tried to run them down. Pisan also testified about this event and claimed that John Allen said that he would burn Dexter Mitchell's house. John Allen did not testify as to this incident on the grounds that there was, at the time of the hearings in these cases, a pending criminal proceeding against him involving the same allegations.

According to Renzi on an occasion in April John Allen drove by the picket line and said to Grisset, ''One day we're going to have it out, just you and me.'' This is denied by Allen.

On April 15, 1988, the Union filed a petition for an election with Region 29 of the National Labor Relations Board. Thereafter on or about April 20, the Union changed its picket signs to indicate that the reason for the strike was solely because of the company's unfair labor practices.

According to striker Anthony Marino his car conked out on Route 107 when John Allen drove up. Marino states that after he told Allen, in effect, to get lost, his brother Joe came by and Allen threw a cup of coffee at him. According to Marino, Allen said that he would blow up his house whereupon he retorted that Allen was full of shit.

According to John Allen, he saw Marino with his car broken down and that Marino gave him the finger. He states that he got out of his truck and that the two of them commenced to curse at each other. He states that when another former employee, Ted Brunto came by, this person challenged him to fight. According to Allen, when Marino's brothers showed up, Joe Marino said, ''Lets blow up their trucks'' and spit at him. At this point John Allen states that he threw a cup of coffee in Joe's face and challenged them all to fight.

Union Agent Sylvester Needham testified that on an occasion in May 1988, John Allen went over to Needham's car parked near the picket line, took out a folder of papers con-

taining among other things checks and petty cash, ran back to his truck and drove away. (John Allen did not testify about this incident because of pending criminal charges.)

Tom Gioia, a union agent, testified that on June 3, as he was sitting in his car talking to another agent, John Allen threw some garbage from the street into the car. Gioia testified that when he pursued Allen for an explanation, Allen spit at him and bumped him with his chest.

Striker Renzi testified that on or about August 30, 1988, he was driving toward the picket line when John Allen stopped in front of him at a stop sign, approached Renzi's car and grabbed him by the arm and leg so as to pull him out of the car. Renzi states that Allen tried to pull the key out of the ignition, slapped him on the head 2 times and said do not try to report this. Renzi states that when two of the other pickets began walking over and asked if everything was alright, John Allen said it was. Renzi testified that he was not injured in this incident. As to this incident, Anthony Marino testified that he saw John Allen with his arm on Renzi; that he asked Renzi if he was OK and that Renzi said yes.

B. *The CB Cases*

As noted above, when the company declined to recognize the Union, the Union commenced a strike and picketing activity on March 19, 1988. During the course of the strike, Sylvester Needham was the business agent of the Union who essentially was in charge of the Union's picket line activities. Additionally, the union always had one or more business agents at the picket line and from time to time a number of other business agents and officials of Local 813 and a sister union, Local 1034 were assigned to participate in these activities. They were:

Carmella Cruz	Executive Board member of Local 813
Micky Giamona	Business Agent of Local 813
Bobby Hunt	Business Agent of Local 813
Bruce Kapp	Business Agent of Local 1034
Jerome Jackson	Business Agent of Local 813
Tom Gioia	Business Agent of Local 813
James Leahy	Business Agent of Local 1034
Marcello Mastropietro	Business Agent of Local 813
Richard Merola	Business Agent of Local 1034
Jim Murray	Vice Pres. and Bus. Agent of Local 813
Sylvester Needham	Business Agent of Local 813
John Peck	Business Agent of Local 813

I also note that most of the striking employees participated in the picketing activities and that they were paid strike benefits conditioned on such participation.

From the inception of the strike, the Union using leased vehicles followed the company's trucks on their routes. This was generally carried out by having a union agent drive a car with a crew of 2 or 3 strikers. It is my opinion from the evidence in this case, that the Union's main purpose in following the trucks was to induce replacement workers by various means, including threats and intimidation, to cease working for the company.

Donald Carmen, who was the fiancee of one of Sarah Allen's daughters and who worked as a replacement during the strike, testified that on or about March 21, 1988, he was on the Searington route with replacements Marc Wilson, Ed Gallagher and another employee when a car with Local 813 picket signs drove up. According to Carmen the group in the car included Carmella Cruz, Mike Renzi, and Mario Greci. He states that Cruz attempted to provoke a fist fight by daring Carmen to hit him but that nothing happened because one of the union's group got Cruz away. Carmen does state, however, that a Spanish man who was part of the union group said that if they continued to work for the company they would ''fuck us up.''

Cruz testified that on one occasion he came on a truck driven by Carmen and that while he (Cruz) was talking to the replacements, Carmen came over, reminded Cruz of the beating he had earlier received in 1986 and stated that he had better leave if he did not want to get hurt again.

According to Carmen, later on the same day, while at Edgemere Drive, he saw Mario Greci or Mike Renzi approach a company-owned dump truck parked about 60 to 70 feet away and make some kind of hand motions around the truck. He states that when he went over, he saw that the electrical switch used to raise and lower the body of the truck had been ripped out.

John Odwazna a nonstriking employee testified that in late March 1988 while driving a truck, a car with four people in it, including striker Larry Laster, drove in front of the truck, slowed down and impeded its progress. According to Odwazna, when a police car came by the car left, but when the police car went away the car resumed its blocking activity. This was essentially corroborated by Michael Sheridan Donovan, who is a son-in-law of the owner, Sarah Allen, and who worked as a replacement during the strike. Donovan adds that during this episode, he saw one of the men in the car giving out leaflets to stores that the company serviced.

Frank Suozzo a replacement, testified that on or about March 24 a grey Buick driven by Business Agent Giamona drove up to him and that one of the passengers said, ''If you do not walk away we'll come to your home and kill you.'' Suozzo identified one of the passengers in the vehicle as striker Joe Nalley. This transaction was denied by Giamona who claimed that he was in Florida at the time and that he did not begin to participate in the strike until March 28.

Donald Carmen and replacement employee Walter Maislin testified about an alleged incident occurring while on the Albertson route on or about March 24. According to Carmen, while at Capri Drive, he saw Mike Renzi and Dexter Mitchell with a tire iron in his hand chasing Maislin. (Carmen identified Mitchell as the person on the right in the photograph which is G.C. Exh. 15f. This however, is Alexander Ham.) Carmen also states that he heard Renzi yell at Maislin that he would meet him after work to fight.

Maislin testified that on this occasion, he was in a backyard picking up garbage when a black man (either Ham or Mitchell), asked if he knew that there was a strike going on. According to Maislin, when he answered yes, the white man said that he was taking his job away and the black man said that he would kick Maislin's ass if he continued to work. Maislin states that as he was walking toward the truck which was attended by Carmen about 500 to 600 feet away, Renzi brandished a tire iron from a car and said that he better not go to work or he would kick Maislin's ass and kill him. In a pretrial affidavit, Maislin did not say anything about being threatened with a tire iron. Mike Renzi one of the persons

who allegedly was involved in this incident denied that any threats were made or that a tire iron was brandished.

John Bretagna, a replacement employee, testified that in March when he was at Rick's Deli, strikers Joe Nalley and Anthony Marino (and a bald man), asked him to sign a card for the union but that he did not. According to Bretagna, later in the day as he was on the route, the three men followed his truck and that Marino threatened to break his legs and burn his home.

Bretagna testified that a few days after the Deli incident, he was followed by Mario Greci who was driving strikers Bruning, Pisan, and Renzi in his blue IROC. According to Bretagna they followed him into a dead end street and when he got out of his car the strikers blocked the exit and asked him to go out on strike with them. He states that they were there for about 5 or 10 minutes when Jackie Allen pulled up with John Dandola. Bretagna states that after the group broke up, Greci again followed him whereupon he pulled over and told Greci that if he did not stop following him he would burn Greci's car.

Bretagna also testified that later in March he had a confrontation with striker D'Angelo Grisset at the dump. In this regard Bretagna states that Grisset accused him of giving him the finger. According to Bretagna, when he denied this, Grisset said that he was going to cut Bretagna's face.

Michael Natow, a replacement, testified that in late March as he was driving home with his girlfriend, he was followed by some of the strikers in the blue IROC (i.e., Mario Greci.) He states that the man in the driver's seat said to him that he would kick Natow's ''ass,'' which frightened his girlfriend. Natow states that the driver of the IROC then swerved in front of their car and when they got off at the Deer Park exit, the IROC followed and the driver again made a threatening gesture and said ''I want you.'' According to Natow, after trying without success to lose the other car, the people approached him at a light and said that Natow should not work at the company anymore or they would kick his ass. Natow says that he agreed not to work whereupon they shook hands and they left. From Natow's description it would seem likely that the other person present during this incident was Peter Bruning.

According to Natow, he nevertheless decided not to quit and he states that a few days after the above incident, he was leaving work when Grisset said that it would be pretty hard to keep the job with broken legs. This occurred, according to Natow at the picket line.

I have already described the incident where Maislin reversed his car up the driveway, hit the fence which knocked down John Allen. It is alleged that the Union is responsible for the actions of Renzi who allegedly yelled at Maislin and reached into his car as he was trying to leave the driveway. Biago Noia a replacement, testified that on one occasion (probably in early April), while on the East Williston route, he was on a truck and was followed by a car containing three white men and one black man. He identified these people from photographs, respectively as Kevin Pisan, Mario Greci, and Jerome Jackson. (Jackson is a business agent and is black.) According to Noia, at one point the three white men got out of the car and a tall blond man who was about 6 feet 3 inches (probably Bruning), told him that he should not be working for the company, and that he would be beaten up if he continued to work. Noia also testified that in or about the week of April 18, he was again approached by some of these men and was told that he should not be working for the company.

In relation to Noia, the Union asserts that Noia's testimony cannot be true because of testimony by the union's witnesses that Jackson normally followed the company's trucks with D'Angelo Grisset, Alex Ham, and Mike Renzi and did not drive with any of the people identified by Noia. (In this respect, it is possible however, that Noia correctly identified the striking employees involved and misidentified the union business agent.)

There was a good deal of testimony concerning a variety of flying objects at or near the company's driveway which is where the picket line activity was carried out. Preliminarily, I should note that the driveway from the company's premises to the street (Miller Road), is covered with gravel consisting of stones which are about 1/2 to 1-1/2 inches in diameter. This set of alleged incidents will be described immediately below.

According to Karen Donovan (a daughter of Sarah Allen), on or about April 11, after she had finished videotaping the picketing employees, she was walking along Miller Road on her way home when she encountered three of the strikers including Larry Laster who would not move out her way. (It appears to me that each side could easily have walked around the other but refused to do so in a demonstration of mutual stubbornness.) In any event, as Donovan walked back up the driveway a large firecracker was thrown near her and exploded with a big bang. (No one was hurt and no one could identify the person who threw the firecracker.)

Karen Donovan also testified that on a Thursday in April, a stone was thrown past her car as she passed by the picket line. She identified some of the persons at the line as being Pisan, Grisset, Lettis, and Business Agent Micky Giamona.

According to John Bretagna, in mid-April striker Dave Phillips at the picket line, threw a rock and broke a window on his car. Bretagna also related another instance when striker Kevin Pisan threw a rock at his car whereupon he (Bretagna), got out of his car and told Pisan that he was going to ''kick his ass and break his neck.'' (In a pretrial affidavit, Bretagna when describing this incident, stated that he told Pisan that he was going to kill him.)

Frank Suozzo, a replacement testified that on or about April 15, as he was leaving the company, he heard and saw rocks bounce off the roof of his Volkswagon. He states that he saw Bruning and Grisset throw the rocks which caused dents in his car's hood and roof.

Daniel Allen testified that on an occasion in April, he saw Kevin Pisan piling up a bunch of stones near the driveway and as Noia drove out, Pisan kicked some stones at Noia's car.

Replacement employees Jeffrey Jaspers and Allen Greco testified that on or about April 20 or 21, as they were leaving the company, some of the pickets spit on their car window, cursed at them, and after a short distance threw stones at their car. Neither saw who threw the stones. They also relate a similar stone throwing incident occurring on or about April 28.

Biago Noia testified that on or about April 30, as he was driving into the company's yard, rocks were thrown at his car. He identified Kevin Pisan as being present at the picket line when this occurred. Noia also testified about another

rock throwing incident, this occurring on May 2 at the picket line in the early morning as he arrived at work. One of the people he identified as being present was a tall blond white man, who probably would be Bruning.

Donald Carmen testified that on or about April 30, as he drove past the picket line he heard thumps on his car whereupon he backed up and confronted the pickets, accusing them of throwing rocks at him. He states that Micky Giamona was present as well as a blond man who tried to grab him inside the car before he (Carmen) drove away.

On August 10, 1988, the company's management, being tired of the strikers using their fence to sit on, decided to put Vaseline on it. It appears that when Larry Laster got angry on one occasion, he pulled out a piece of the fence and threw it in the air. (Laster claims that he got angry when John Allen threw a cup of coffee at his car.) Although Andrea Allen testified that Laster threw the piece of wood at her, the testimony in toto indicates that Laster merely threw the piece of fence in the air without intending to hit anyone. (This does not mean, however, that it was alright to break up the fence in the first place.)

In a somewhat related manner, there was also testimony that in mid-May, nails were found in the gravel on the driveway.

According to Bretagna on one occasion in April as he was leaving the yard's driveway, one of the pickets jumped in front of his car and then claimed that Bretagna had tried to hit him. Bretagna testified that he was driving at about 3 mph when this happened after which the man grabbed onto his door while yelling at Bretagna. Jackie Allen testified that three of the union agents went over to Bretagna's car and that one of the men tried to pull Bretagna out of his car. This was, however, not confirmed by Bretagna.

Daniel Allen testified that in or about the third week of April, one of the pickets stepped in front of a car driven by a replacement as he was driving out of the driveway. He states that as the next car went down the driveway, it tried to pass the first car on the right and as a result, banged into the first car's mirror and broke it. At the time of the incident, the first car had its right-hand blinker on and it is not at all clear to me how the broken mirror was caused by the pickets. Indeed it is more likely that this minor accident was caused by the second driver not watching where he was going.

On or about April 20 a convoy of the company's vehicles went to the gas station. According to Bretagna, Larry Laster, in a light blue Honda cut the group off and prevented them from going into the gas station. According to Bretagna, he got out of his car and with a bat threatened Laster in an effort to get him to move. Bretagna states that Laster, with Grisset, then came over to his car and brandished a snow shovel in a threatening manner.

Replacements Jaspers and Greco testified that on or about April 22 they were followed by a two men in a car and that one of them said that he was going to burn Greco's truck. Greco wrote down the license plate number, which after investigation by the police, showed that it was assigned by the Union to Business Agent Bruce Kapp.

Biago Noia testified that at the end of April he was followed on the Williston route when a car pulled up and one of the people said ''Come on Rocky, I can take you on; You'll be spitting blood. ''Noia however, could not really identify the people in this car and his description of the driver during his testimony was significantly different than in his pretrial affidavit.

John Allen testified that during an incident on or about June 3 striker Dexter Mitchell, in the presence of Union Agent Giamona and other company employees pushed him to the ground.

John Allen finally testified that on or about September 1 Mike Renzi cursed at him for threatening his father, came over to the truck and started pulling on Allen's leg. He states that when Giamona came up in his car, Renzi stopped and left.

C. *The 8(b)(7)(C) Allegation*

As noted above, the picketing commenced on March 19, 1988. As evidenced by the picket signs and the concessions of the Union, at least as one of the objects of its picketing was to gain recognition from the employer.

The facts also show that the Union on April 15 filed a representation petition in Case 2–RC–6979, seeking an election for the group of employees on whose behalf it was picketing. Thus, the Union filed its petition within 30 days of the commencement of the picketing. Notwithstanding this fact, the employer contends that the Union engaged in picketing for more than a reasonable period of time without filing for an election because of the extensive level of threats and violence described above.

D. *The Reinstatement of the Strikers*

On October 26, 1988, Eugene Eisner, counsel for Local 813 wrote to the company as follows:

> On behalf of my client, Private Sanitation Union, Local 813, it is hereby offered on behalf of all striking employees that they return to work immediately and unconditionally.

On October 27 Company Attorney Ziskind replied:

> On behalf of the Daniel F. Allen & Co. Inc., this letter shall serve to acknowledge receipt of your hand-delivered letter dated October 26, 1988, wherein you purport that all striking Allen employees are prepared to immediately and unconditionally return to work.
>
> In order to facilitate an orderly return of those strikers who desire to immediately return to their former or substantially equivalent positions of employment, it would be appreciated if you would provide the Daniel F. Allen & Co. Inc., as well as myself with such employee's names, current home addresses and telephone numbers.
>
> The company is prepared to take all appropriate steps so as to assure an orderly transition for those striking employees who wish to immediately return to work to their former positions of employment.

It is noted that as of October 26 and 27, 1988, the company was operating with replacement employees including some persons who were relatives of the owner. It also was asserted by the company that as of those dates, the company had lost some contracts and that it therefore employed fewer drivers and helpers than when the strike commenced on

March 19. However, it was not shown by the company that any of the strike replacements were hired or thereafter employed as permanent replacements. Also no evidence was offered as to the actual employee complement as of late October or thereafter.

On October 31 Eisner wrote to Ziskin as follows:

> Inasmuch as my letter of October 26, 1988, stated that all striking employees have offered to return to work and you obviously know who your striking employees are, there is no need to inform you who they are. Nevertheless, in order to move this issue forward I am enclosing a list of all striking employees who are prepared to immediately and unconditionally return to work as stated in my letter of October 26.

The Union forwarded with the letter the following list of names:

> Bruning, Bruton, Cranmer, Michael Donovan, Farrel, Fells, Furline, Greci, Grisset, Ham, Harris, Laster, Lettis, Anthony Marino, Joseph Marino, Mitchell, Nalley, Phillips, Pisan, Renzi, Semonella, Talton, and Wesselhoft.

On November 1 Ziskin wrote to Eisner as follows:

> As you know, the . . . Company is presently contesting . . . the issue as to Local 813 IBT's representative status, if any, with respect to its striking employees.
>
> As the (company) has received information to the effect that certain striking employees have secured other permanent employment positions, the question arises as to the accuracy of your letter of October 26 . . . wherein you indicate that all the striking employees seek immediate reinstatement.
>
> Given the above circumstances, and as the company specifically questions your authority and/or your representative status to represent the striking employees, the(company) will give appropriate consideration to those written requests which it may come to receive from individual striking employees.

On November 9 Bernard Edelstein wrote to Ziskin as follows:

> As you well know Eugene Eisner . . . is in full charge of all legal matters on behalf of Local 813 in connection with the Daniel F. Allen & Co. Inc., case. In that connection, I instructed Eisner to send his letter of October 26 to you and your client offering the unconditional return of all striking employees. Thereafter, when you wrote to Eisner on the 27th of October and asked for the names of all the employees who wished to return to work, I provided such a list to Eisner who in turn enclosed said list with his letter to you dated October 31, 1988.
>
> For some strange reason, you are now questioning Eisner's authority and/or representative status to represent the striking employees . . . . Please be assured that Eisner has full authority to act on our behalf in this legal and organizational struggle. . . .
>
> Incidentally, Eisner informs me that prior to the letter we instructed him to send on October 26th, you and he had explored possibilities of settlement of this case including but not limited to reinstatement of all striking employees.
>
> You advised Eisner that there could be a problem since your client anticipated losing one of his major accounts. Of course, we would cross that bridge when we come to it should you want to resume those discussions.

On November 28 Sarah Allen sent a letter to Eisner as follows:

> Within the past several weeks our company has received several communications from your office as well as from Local 813 regarding the reinstatement of certain striking employees. As previously indicated to you, our company questions and challenges the fact that Local 813 represents any of our striking employees.
>
> As a result of all of the above we do not believe that your letters indicating that our employees seek to return to work are in fact representative of such employees' wishes.
>
> Until such time as we receive letters requesting reinstatement from each of the named employees, we will have no alternative but to continue to conclude that such employees do not wish reinstatement to their former positions of employment with this company.

On December 21 the company sent a letter to all the striking employees except Edmund Ligowski and George Middlebrook. (In the letter of October 31, neither of these individuals is listed as one of the strikers.) This read as follows:

> Within recent weeks it has been alleged by Local 813 IBT and its attorneys that you are prepared to immediately return to your former position of employment with our company.
>
> If in fact you are interested in returning to work in your former or substantially equivalent position of employment, please confirm your request to immediately return to work in writing to the undersigned within five working days of receipt of this notice. A simple note indicating same will be sufficient.

On December 27 James Talton wrote to Sarah Allen stating; ''I received your letter today. I do not wish to return to Daniel F. Allen.''

On December 30 Martin Edelstein wrote to Sarah Allen as follows:

> It has come to our attention that you have written to various striking employees . . . requesting that they ''confirm (their) request to immediately return to work in writing . . .'' These letters do *not* set forth an offer of employment . . . .
>
> Nevertheless, on behalf of *all* striking employees, and despite the fact that you are not entitled to demand further indications of their willingness to return, this is to reiterate the unconditional offer of all employees to return to work set forth in Eugene Eisner's letter . . . of October 26. However, unless and until we receive *of-*

fers of employment the employees will continue to strike.

On January 12, 1989, Sarah Allen sent a letter to strikers Bruning, Bruton, Cranmer, Donovan, Farrel, Fells, Furline, Greci, Ham, Harris, Laster, Lettis, Marino, Mitchell, Nalley, Phillips, Pisan, Renzi, Semonella, and Wesselhoft. This read:

> This letter shall serve to confirm that you are hereby unconditionally offered reinstatement to your former or substantially equivalent position of employment with our company. In order to facilitate an orderly return of those striking employees wishing to return to work, please fill out and return the enclosed postcard.[7]
>
> Please examine the enclosed postcard carefully. It contains two choices. Please be sure to select the choice of your choosing. If you wish to return to work, please select choice 1 and indicate the date thereon that you are available to return to work and set forth your home telephone number.
>
> If you do not wish to return to work with the company, please cross out the first choice, and return the postcard to us as soon as possible.
>
> . . . .
>
> In the event we do not receive your postcard response within five business days of our sending this letter, the company shall have no alternative but to conclude you are rejecting reinstatement.

On January 12 Sarah Allen sent a separate letter to striker Michael Donovan. This read:

> As you were on Worker's Compensation prior to March 18, 1988, please provide us also with information concerning your physical condition in response with the postcard.

On January 20 Martin Edelstein sent a letter to Sarah Allen reading:

> This is in response to your letter of January 12th sent to striking employees . . . . We have reviewed these letters with the employees and have observed that there is no date stated on which the employees are to report to work. Instead, you have requested these individuals to tell you when they are available. Generally, this is to inform you that all of the striking employees are available to return to work within a reasonable time from today's date, but they wish to be informed of the specific date on which you would like them to report, in order to determine whether they will have any problems reporting then. It is our understanding that most of these employees are able to return to work very soon, but a few may need a little extra time. Please notify us immediately of the date you would like each employee to report to work . . . .
>
> . . . .
>
> If any individual employee has a problem with the date you propose, we will communicate that problem to you promptly, and will advise you of an alternative date that the employee could return to work . . . .
>
> We have received from 16 of the striking employees the post cards which you requested they sign and return to you. In all cases, the employees have indicated their willingness to return to work and have requested that Local 813 be notified by you of the date on which they should return. Those post cards are enclosed with this letter. With respect to the other striking employees whose post cards are not enclosed, we are currently taking steps to learn of their wishes and will inform you shortly . . . .

On January 31 Sarah Allen wrote to strikers, Bruning, Bruton, Cranmer, Donovan, Harris, Fells, Furline, Greci, Laster, Lettis, Marino, Mitchell, Nalley, Phillips, Pisan, Renzi, Semonella, and Wesselhoft as follows:

> As of this date, we have twice previously written to you offering immediate and unconditional reinstatement to your former position of employment . . . .
>
> As you know, when on March 19, 1988, you chose to strike, this company hired employees to fill your position so that the company could fulfill its carting obligations and contracts. Our business involves service to the public and requires having sufficient manpower to cover our routes and operate our trucks. As a result thereof, we must be assured that employees will report for work each day so that we can schedule our routes and crews.
>
> We are again offering you immediate and full unconditional reinstatement to your former position of employment. So as to assure an orderly transition of employees, and so as to guarantee a full complement of employees, it is essential that you personally reply to this letter so as to advise of your personal availability.
>
> Due to scheduling requirements, we cannot simply say report to work on a given day, as we have no idea as to how many, if any, striking employees in actuality would return to work. In this regard, unless you personally respond and advise as to your availability, we are not in a position to take such action as may be appropriate with respect to our present employees.
>
> In order to facilitate an orderly return of those striking employees wishing to return to work, please fill out and return the enclosed postcard.
>
> Please examine the . . . postcard carefully. It contains two choices . . . . If you wish to return to work, please select choice 1 and indicate the date thereon that you are available to return to work and set forth your home telephone number. If you do not wish to return to work with the company, please cross out the first choice and return the postcard to us as soon as possible.
>
> . . . .
>
> In the event we do not receive your postcard response within five business days of our sending this let-

[7] The postcard which was enclosed with the January 12 letter read:

I hereby acknowledge receipt of your offer of reinstatement dated January 12, 1989

Choice 1

I wish to immediately return to work and I am available to return to work on January ____, 1989.

My home telephone number is _____.

Choice 2

I do not wish to return to my former position of employment.

_____

Signature

ter, the company shall have no alternative but to conclude you are rejecting reinstatement with our company.

So as to avoid any reluctance on your part to contact our company and to ensure an orderly return to work of those striking employees desiring to return to work, we urge that you call our attorney . . . who will ascertain your availability and help in scheduling your prompt return to work . . . .

We hope to personally hear from you regarding this offer of reinstatement within the next several days.

On February 3 Bernard Edelstein wrote to Sarah Allen as follows:

> We have communicated with the striking employees regarding your letter of January 31, 1989. On their behalf, this is to advise you that they do not consider that letter (or any previous correspondence) to constitute a valid offer of reinstatement, since you persist in failing to state a report date. Your alleged scheduling concerns are simply no excuse for your failure to offer reinstatement on a date certain.
>
> Despite our ongoing objection to your further investigation of the striking employees' availability, which is all that your communications to date about the strikers' availability amounts to, this is to inform you that all striking employees are available to report to work on February 13, 1989.
>
> They, and the Union, expect immediate notification . . . that you are requesting them to report to work on that date, or some other, later date. These employees must make arrangements in their personal lives in order to be prepared to report for work. Please respond promptly.

On February 11 the company sent a mailgram to Kevin Pisan which read:

> As per your request to return to work please report to work at our new location at 114 Sylvester Street Westbury, N.Y. on Friday February 17 1989, at 6:30 AM. Please confirm by telephone . . . on or before Wednesday February 15, 1989, that you will be returning to work on the above date. This offer of reinstatement contemplates that you will return to your former position of employment or substantially equivalent position of employment in accordance with the terms and conditions of your employment as same existed on or about March 19, 1988. In the event that you do not respond to this offer of reinstatement on or before Wednesday, Feb. 15 . . . we will have no alternative but to conclude you waive reinstatement with our company.

On February 11 an identical mailgram was sent to Ralph Semonella. According to Sarah Allen on February 23 Semonella called and said that he did not want to return to work. Thereafter on March 1 the company sent a letter to Semonella as follows:

> This letter shall serve to confirm your advising our company on February 23 . . . that you are no longer interested in returning to work . . . .

On February 15 Pisan called the company and told Sarah Allen that he would return on February 27. She agreed.

On February 22 Karen Donovan claims that Pisan called the office and that she heard him say on the answering machine that he was going to cut John's heart out (i.e., John Allen).

On February 24 the company sent a letter to Pisan which read:

> On Wednesday, February 22, 1989, we received a series of three obscene messages on our telephone machine.
>
> Upon listening and re-listening to the voice message, we are of the opinion and have reason to believe that you are in fact the caller.
>
> As a result thereof, we must at this time withdraw our offer of reinstatement to you. We will not employ individuals who do not conduct themselves in a proper manner . . . .
>
> If in fact you deny being the author of such calls, and are willing to submit to a voice analysis, the cost of which we will pay, please so advise, in writing, our attorney . . . . Should the results of a voice analysis substantiate the fact that you did not in fact place the . . . calls, we will be pleased to once again offer you . . . reinstatement.

Regarding the above alleged incident, Kevin Pisan did not deny the alleged threat.

On February 21 the company sent a mailgram to Alexander Ham offering him reinstatement and telling him to report on Wednesday, March 1. It appears that Ham did go back to work on March 7 but quit thereafter on March 18. Karen Donovan testified that Ham told her that he got another job.

On February 23 the company sent a letter to Edmund Ligowski telling him to report to work March 1 and to confirm by phone on or before February 27. On March 7 the company sent another letter to Ligowski stating ''you did not respond to our letter dated February 23, 1989, concerning reinstatement . . . .'' The letter went on to state that if the company did not hear from him by March 13 they would consider that he was rejecting reinstatement.[8]

On March 7 a letter was sent to Bruning advising him to report on March 16 and to confirm by March 13. According to Sarah Allen, Bruning called and said that he would not return because he had gotten his old job back. On March 8 Sarah Allen sent Bruning a letter confirming his phone call that he was not interested in returning to work.

On March 7 the company sent a letter to Christian Harris advising him to report to work on March 16 and to confirm by March 13. Thereafter, on March 14 another letter was sent to Harris telling him that he had not responded to the March 7 letter. The second letter gave him until March 20 to respond, and advised him that if he did not respond the company would consider that he was rejecting reinstatement.

On March 14 a letter was sent to Mario Greci telling him to report to work on March 23 and to confirm by March 20. Thereafter, on March 19 Karen Donovan testified that she got a call from Greci saying that he was not returning to

[8] This record does not show that Ligowski was in fact a striker. Ligowski did not sign an authorization card for the Union.

work. On March 21 a letter was sent to Greci confirming his refusal of reinstatement.

On March 14 the company sent a reinstatement offer to George Nalley. Thereafter on March 21 another letter was sent to Nalley because he did not respond to the first letter. The second letter gave him until March 27 to respond.

On March 21 a letter was sent to Michael Renzi telling him to report to work on March 30 and to confirm by March 27. On March 28 the company sent a second letter to Renzi stating that they had gotten no response and extending Renzi's time to answer. On March 27 the Union sent a mailgram to the company stating that Renzi would return to work on April 10. On March 28 the company sent a letter to Renzi acknowledging that he would return on April 10. In the meantime it appear that Renzi became ill and on May 11 the company sent a letter to Renzi acknowledging receipt of a doctor's note and confirming that Renzi should report to work on June 1.

On March 21 the company sent a reinstatement letter to Richard Cranmer. On March 8 a second letter was sent to Cranmer extending his time to respond to April 3.

On March 21 a reinstatement letter was sent to Michael Donovan. On March 28 another letter was sent to Donovan extending his time to respond to April 3.

On March 28 a reinstatement letter was sent to Patrick Bruton advising him to report on April 6 and to confirm by April 3. Thereafter, on April 4 a second letter was sent to Bruton telling him that company had not heard from him and extending his time to respond to April 10.

On April 4 the company sent a letter to Jason Farrel asking him to report to work on April 17. On April 6 the Union sent a letter to the company confirming that Farrel would return to work on April 17. In response, on April 12, the company sent a letter to Farrel telling him to report to work on May 1 rather then April 17, ''because of unforeseen scheduling problems'' Thereafter the union sent a letter to the company confirming that Farrel would return on May 1. However, on April 17 the company sent a letter to Farrel confirming that he could return on April 17.

On April 4 the company sent a letter to David Wesselhoft asking him to report to work on April 17. Thereafter on April 11 a second letter was sent to Wesselhoft stating that the company had no response to the first letter and extending his time to respond to April 17.

On April 12 the company sent a letter to Dennis Lettis advising him to report to work on April 25. On April 18 Sarah Allen wrote to Lettis confirming that he would return on April 29.

On April 19 the company sent a letter to George Fells advising him to return to work on April 27.

On May 22 the company sent a letter to Raymond Furline telling him to report on June 1. On May 27 Furline advised the company that he would return on June 1 and this was confirmed by company by letter dated May 31.

On May 22 the company sent a letter to Anthony Marino telling him to report on June 1. Thereafter, on May 25 the company sent a letter to Marino confirming that he told the company on May 23 that he no longer was interested in working for the company.

On June 2 the company sent a letter to David Phillips telling him to report on June 3.

As of the last date of the hearing the company had made no offers of reinstatement to Talton, Grisset, Laster and Mitchell. As to Talton, the company asserts that Talton informed the company, in writing, on December 27 that he was not seeking reinstatement. As to Grisset, the company asserts and the record establishes that Grisset was not an employee as of the time of the strike and therefore not entitled to reinstatement. As to Mitchell and Laster, the company asserts no reason why they were not offered reinstatement. (No contention was made either to them or to me that they were deemed ineligible for reinstatement because of alleged strike misconduct.)

III. ANALYSIS

A. *The 8(a)(1) Allegations Prior to the Strike*

The credible evidence establishes that on or about November 9, 1987, John Allen approached Union Agents Sylvester Needham and Carmella Cruz while they were soliciting company employees on Willets Road and that he threatened to kill Needham while spitting on him. I also conclude that during this incident, John Allen grabbed a briefcase and papers held by Needham and threw them away. I do not, however, credit the assertion by Dexter Mitchell that Allen threatened to discharge employees if they talked to the union agents as this was not corroborated by any of the other persons who witnessed this event. I therefore conclude that the company violated Section 8(a)(1) of the Act insofar as John Allen spit on Needham, threw his papers and briefcase into the air, and threatened to assault him. *Workroom For Designers*, 274 NLRB 840, 855 (1984).

Kevin Pisan testified that a few days after the Willets Road incident, he overheard John Allen tell employee George Fells to lie to the police about that incident. Pisan testified that when Fells refused, Allen told him that he was discharged. This allegation was not corroborated by Fells and there is no allegation in the complaints that Fells was in fact discharged. Therefore, although I do not think that John Allen was a credible witness, I have serious doubts as to the reliability of Pisan as well. On the basis of this record, I do not think that this allegation has been substantiated by a preponderance of the evidence.

Similarly, I view as suspect the testimony of Kevin Pisan and Dexter Mitchell to the effect that in November 1987 John Allen, in the company yard told the assembled employees of the company that if a union came in he would fire the workers or close the company. In the absence of corroborating testimony from any of the other employees who were in attendance at this alleged meeting, I conclude that the General Counsel in this respect, has not proven her case.

David Wesselhoft, however, testified credibly that in December 1987 he was with John Allen at the dump and that Allen stated that he would fire or beat up anyone who was involved with a union. I conclude that the Respondent violated Section 8(a)(1) of the Act in this regard.

Kevin Pisan testified that in February 1988 he, Dexter Mitchell, Mario Greci, and Alexander Ham were at the dump talking to Carmella Cruz when John Allen came over and said that if they had any idea of bringing in a union, he would fire them all and close the yard. This alleged statement was not corroborated by any of the other individuals

who allegedly were present and I conclude that the allegation is not supported by a preponderance of the evidence.

Kevin Pisan also testified to an incident in late January or early February 1988 where he and Mario Greci were talking to two union agents when John Allen told the agents to get off his truck and stated that if the yard went union, he would close it down ''or something to that effect.'' This was not corroborated by Greci or any of the union's agents. I therefore conclude that this allegation is not supported by a preponderance of the evidence.

B. *The 8(a)(1) Allegations After the Strike Commenced*

James Talton credibly testified that on March 20, 1989, as he was driving Anthony Marino home, he encountered John Allen who said or asked ''you're one of them now.'' Talton testified that when he responded that he signed a card, Allen said, ''You no longer work here.'' Although I do not believe that Talton's testimony makes out a case of coercive interrogation, I do think that Allen's statement amounts to an unlawful threat of discharge.

The complaint alleges that in late March 1988, the company attempted to cause the arrest of union representatives and striking employees so as to prevent them from engaging in ambulatory picketing and leafletting activities. In support of this allegation, the testimony of Union Agent Marcello Mastropietro revealed that while he and employee Alexander Ham were following company trucks, three police cars arrived on the scene and demanded that the union agents turn over their car keys. (Another union car, driven by Ricky Merola was also at the scene by this time.) According to Mastropietro, the police officers after a while, gave back the keys, told them that it was against the law to follow the trucks and further stated that they were lucky that Daniel Allen was not filing charges for harassment.

In relation to the above noted incident, it is noted that from the outset of the strike the union by various business agents and striking employees made a practice of following the company's trucks and in some cases threatened replacement workers and at other times, physically impeded the progress of the trucks as they tried to pick up garbage. In this context, and assuming that the police arrived on the scene at the bequest of the Allens, I do not see how the transaction described above could be described as an attempt by the company to have the union agents and strikers arrested. Indeed, according to the union's evidence the police officer stated that Daniel Allen was not pressing charges against them.

David Wesselhoft, who I found to be a credible witness, testified that in late March 1988 as he was driving with striker Peter Bruning, John Allen came over to them when they were stopped. Wesselhoft states that Allen claimed that they were following a car driven by one of the strike replacement, that he grabbed Bruning and challenged him to a fight. In my opinion, such conduct violates Section 8(a)(1) of the Act. *Workroom For Designers*, supra.

Toward the end of March 1988 an incident occurred at the picket line, wherein a replacement (Walter Maislin), was spoken to by striker Michael Renzi, as a result of which Maislin, in fear, backed up his car hitting a fence on the property. When he moved his car back and forth, a piece of the fence broke loose and it hit John Allen knocking him to the ground. When Allen got up, he told Maislin to leave and told the assembled pickets that he was going to have them all arrested. When Maislin got out on the street he got out of his car and brandished a chain. Under all the circumstances, I do not believe that Allen's threat to have the pickets arrested can be construed as an illegal threat. Nor do I believe that the actions of Maislin either constituted a threat or an assault (except unintentionally against Allen). Nor do attribute Maislin's actions to the company.

Charles Davis credibly testified that on or about March 30, 1988, he received a phone call from Daniel Allen who said that Dexter Mitchell and D'Angelo Grisset were chasing him with guns and knives. According to Davis, Allen said that if they messed with his family he would mess with Davis' family too. In my opinion, the call by Daniel Allen constituted a threat of physical harm. Although Davis was not an employee of the company, it was foreseeable that the statement would be related to Dexter Mitchell who was a striker and who was living at the home of Davis at this time. As such, it is my opinion that this statement constituted a violation of Section 8(a)(1) of the Act.

Striker Mario Greci testified that in early April 1988, John Allen came to his home. Based on the credited testimony of Greci I conclude:

1. That John Allen illegally promised to give Greci double pay if he abandoned the strike and returned to work. *Workroom For Designers*, 274 NLRB 840, 842 (1985).

2. That John Allen illegally stated in effect, that it would be futile for the employees to select a union in that he said that he would never sign a contract with the union. *Workroom For Designers*, supra at 861; *American Telecommunications Corp.*, 249 NLRB 1135 (1980).

3. That John Allen illegally threatened to sell the company if the employees selected a union to represent them. *NLRB v. Gissel Packing Co.*, 395 NLRB 575 (1969); *Massachusetts Coastal Seafood*, 293 NLRB 496 (1989); *Workroom For Designers*, supra.

4. That John Allen threatened to kill anyone who got in his way and implicitly threatened to damage Greci's car. (My feeling is that the use of the word kill is not intended literally, but that it nevertheless is meant to convey a threat of assault.)

On or about April 4, 1988, Business Agents Mastropietro and Giamona, with strikers Wesselhoft, Ham, and Marino followed some of the company's trucks. At Shrub Hollow Road, John Allen walked over to Giamona's car and said, ''I know you carry a gun, I can carry one too, I'm going to get you.'' At another point during the transaction, John Allen spit at Mastropietro, dared Mastropietro to hit him and said that he knew where Mastropietro's family lived and that he was going to ''kill'' them. When the police arrived and broke up the confrontation, the officer said that it was against the law to be following the trucks. Based on the above credited testimony, I conclude that the statements by John Allen amount to threats of bodily harm made to Mastropietro in the presence of employees and therefore constitute violations of Section 8(a)(1) of the Act.

Striker Dennis Lettis testified that in early April 1988 he was driving with Dexter Mitchell near the railroad station in Hicksville when John Allen cut him off with his car. Lettis credibly testified that Allen said that if anything happened to any of the replacements, ''I'll take care of you guys.'' Mitchell also testified that Allen said, ''You better leave my

workers alone or else I'm going to get you.'' Accordingly, I find that John Allen made threats of physical harm to striking employees and therefore violated Section 8(a)(1) of the Act, notwithstanding that Mitchell, as evidence by his response, did not seem to be particularly intimidated.

On an occasion in April 1988, Union Agent Jerome Jackson was with some of the strikers at the Breakaway Delicatessen when John Allen came in. The credible evidence establishes that when the employees asked why Allen did not just sign a contract, he responded that he would talk to the men if they got rid of Jackson. In my opinion, this constituted an attempt to bypass the union and deal directly with the employees in violation of Section 8(a)(1) of the Act. *Workroom For Designers*, supra at 855.

According to Business Agent Jerome Jackson on one occasion in April when he was following John Allen's truck, the latter suddenly backed up his truck so fast that Jackson had to back up his car in order to avoid being hit. (According to Jackson, he and Allen were backing up the street at 40 mph.) Jackson states that after the vehicles stopped, John Allen came over and yelled ''hit me,'' and Jackson states that he would have, had not the other employees restrained him. According to Jackson, Allen took the strike signs off the car, put them into the garbage hopper and said to Grisset, ''One day its just going to be me and you buddy.'' According to Jackson, when the police arrived, they told him to stay at a distance from the trucks and not to get too close. Jackson's testimony regarding this incident was corroborated in essence by the testimony of Mike Renzi and Kevin Pisan. (According to Pisan when the police came they told Allen to calm down or they would lock him up.) Based on this testimony I conclude that the company violated Section 8(a)(1) of the Act when John Allen drove his vehicle in a reckless and threatening manner and by attempting to provoke a fight with Jackson and Grisset in the presence of employees.

I also find that John Allen violated Section 8(a)(1) of the Act by driving his trucks in such a reckless manner that his conduct amounted to threats of physical violence. Specifically, I credit the testimony of Mario Greci, Mike Renzi, Kevin Pisan, and David Wesselhoft, that on four occasions in or about April 1988, John Allen crossed into their lanes as he drove a truck on the opposite side of the street.

There was credible testimony by Dennis Lettis, Dexter Mitchell, and Kevin Pisan that on or about April 12 1988, they were standing outside Dexter Mitchell's house when John Allen drove over and told Pisan that he was going ''to take care of you, your wife and kid.'' Additionally, there was credible testimony that John Allen threatened to burn Pisan's and Mitchell's house; that he threatened to kill Pisan's family; and that he drove his vehicle at these employees in a reckless and threatening manner. John Allen did not testify as to this incident on the grounds that there was, at the time of the hearings in these cases, a pending criminal proceeding against him involving the same allegations. Based on the credited testimony, I conclude that the employer violated Section 8(a)(1) by the above statements and conduct of John Allen.

Mike Renzi credibly testified that on one occasion in April 1988, John Allen drove by the picket line and said to Grisset, in the presence of employees, ''One day were going to have it on, just you and me.'' I construe these remarks as a threat of assault in violation of Section 8(a)(1) of the Act.

The credible testimony of Anthony Marino was that on an occasion (in May?), his car was stalled on Route 107; that John Allen came by whereupon the two proceeded to get into an argument; that John Allen threw a cup of coffee at Marino's brother and that he threatened to blow up Marino's house. I conclude that Allen's conduct in this regard constitutes a violation of Section 8(a)(1) of the Act.

Union Agent Sylvester Needham credibly testified that on an occasion in May 1988, John Allen went over to his car parked near the picket line, took out a folder of papers containing among other things checks and petty cash, ran back to his truck and drove away. I conclude that Allen thereby violated Section 8(a)(1) of the Act.

Tom Gioia, a union agent, testified that on June 3, as he was sitting in his car talking to another agent, John Allen threw some garbage from the street into the car. Gioia testified that when he pursued Allen for an explanation, Allen spit at him and bumped him with his chest. In my opinion, Allen's conduct on this occasion violated Section 8(a)(1) of the Act.

Striker Renzi testified that on or about August 30, 1988, John Allen approached his car and tried to pull Renzi out of the car by grabbing at his arms and legs. Renzi states that Allen tried to pull the key out of the ignition, slapped him on the head two times, and said, ''[D]o not try to report this.'' In my opinion, this assault on Renzi constituted a violation of Section 8(a)(1) of the Act.

C. *The 8(b)(1)(A) Allegations*

As noted above, when the company declined to recognize the Union, a strike ensued on March 19. In addition to the establishment of a picket line at the company's premises, the Union from the outset made a practice of following the company's trucks. One of the purposes of this type of activity was to persuade the strike replacements whom the company had hired, to cease work. The questions posed here are whether on various occasion the Union by its agents or by persons whose actions are legally binding on the Union, overstepped the bounds of permissible conduct.

In relation to the picket line, the evidence establishes that the Union had its business agents, on a scheduled basis, at the picket line for the entire duration of the strike. The evidence also establishes that in relation to the practice of following the company's trucks, the Union assigned business agents in leased automobiles each usually with two or three striking employees to perform this function. Additionally, the evidence establishes that the strikers were paid weekly strike benefits conditioned on their performing some picket line activities;

Preliminary to my findings regarding the various incidents alleged to be violative of the Act, I note the following case law in relation to whether a union may be held liable for the actions of people (including unidentified people), other than official union agents:

In *Teamsters Local 563 (Northern Contractors)*, 183 NLRB 1023, 1025 (1970), the Board adopted the administrative law judge's conclusions that the Union violated the Act by ''(l) assaulting and threatening employees; (2) damaging vehicles driven to work by employees; (3) throwing rocks and other objects at employees and their vehicles; and (4) blocking ingress to the plant premises.'' On the issue of

union liability for the acts of pickets, the administrative law judge stated:

> [I]t is true, as Respondents point out, that no officer or official agent of Local 563 was present on the picket line when any of this conduct occurred. However, it is noteworthy that Respondents concededly appointed no one to be in charge of the picket line . . . . As reflected in the evidence . . . the conduct here . . . is not of an isolated nature, nor is this the case of an isolated picket getting out of hand. On the contrary, the incidents engaged in were repetitive, they were of a violent and aggravated character, and they were participated in by a majority, if not all, of the members of Respondent who went out on strike.

In *Allied & Technical Workers District 50 Local 14055 (Austin Co.)*, 198 NLRB 1184 (1972), the Board adopted the conclusions of the administrative law judge who found that the Union had violated the Act when its pickets (l) blocked driveways and turned away employees who attempted to go to work; (2) obstructed egress of vehicles from the plant; (3) blocked ingress to a truck attempting to make a delivery; (4) blocked trucks until the police ordered the pickets away; (5) threatened physical harm; and (6) placed spikes and nails in the roadways. As to the Union's responsibility for those acts where there was no evidence of direct participation by union agents, the administrative law judge stated:

> Respondent did nothing to repudiate the conduct of the pickets. I find, accordingly . . . that Respondent violated Section 8(b)(1)(A) by impeding access to the Dow plant by placing spikes and nails in roadways.

In *Teamsters Local 918 (Tale-Lord)*, 206 NLRB 382, 383 (1973), the Board discounted the testimony of the union's agent that he had told strikers to behave and not throw eggs, in view of the fact that the union agent also, on occasion, participated in such conduct which continued after the alleged instruction. The Board stated:

> It is well settled that where picket line misconduct takes place in the presence of a union agent, and the agent does nothing to disavow such conduct or discipline the offenders, the union assumes responsibility for such misconduct.

I also note that in that same case, the Board dealt with the Union's contention that its conduct was provoked, by stating:

> Secondly, assuming arguendo that such provocative conduct it occur, conduct by a union agent otherwise coercive and thus violative of Section 8(b)(1)(A) of the Act cannot be justified merely because an employer agent also engaged in unlawful activity.

In *Food & Commercial Workers Local 222 (Iowa Beef)*, 233 NLRB 839 (1977), the Board held that a union violated the Act by among other things (l) throwing wood at an employee; (2) placing nails on driveway; (3) following vehicles of employees to and from picket line; and (4) driving in a dangerous and reckless manner intended to harass and intimidate nonstriking employees. The Board stated:

> The Board has stated many times that ''a union which calls a strike must retain control over the pickets in whatever manner it deems necessary in order to insure that they do not act improperly. If a union is unwilling or unable to take the necessary steps to control its pickets it must then bear the responsibility for their misconduct.'' It has long been settled that unions are normally responsible for the conduct of authorized pickets. Where as here the pickets were delivered to and from the picket line a union-owned bus and paid their strike benefits based on the regular performance of their picketing duties there can be no doubt of the Respondents' responsibility.
>
> Nor, as was said by the Board in *Local 248*, supra, does Respondents' responsibility and liability disappear when nonstriking employees are followed, threatened or assaulted away from the picket line when it is in effect an ''extension of picket line misconduct.''

In *Food & Commercial Workers Local 248 (Service Food)*, 222 NLRB 1023, 1034 (1976), the administrative law judge, in an opinion adopted by the Board stated:

> There is no question that the picket captains were the agents of the Union representing it in the general area of the strike and thus responsible for acts occurring within the scope of that general authority even if not specifically authorized or indeed specifically forbidden . . . . Moreover, while individual union members as such cannot be considered agents of the Union per se . . . . authorized pickets who are paid strike benefits can . . . . Thus there is no question that misconduct by picket line captains and pickets on the picket line is attributable to the Union. Nor is it necessary that the individual identity of the pickets be established . . . In the *Kargard* case, supra, 196 NLRB at 650, fn. 11, it was stated that where the ''overall facts clearly reveal that the (misconduct) was caused by pickets: it was not'' necessary to determine the exact picket who caused the (misconduct).

Donald Carmen, a replacement, testified that on or about March 21, 1988, he was on the Searington route with replacements Marc Wilson, Ed Gallagher, and another employee when a car with Local 813 picket signs drove up. According to Carmen, Carmella Cruz who was in the car with Mike Renzi and Mario Greci attempted to provoke a fist fight by daring him to hit Cruz. Carmen also testified that a Spanish man who was part of the union group said that if they continued to work for the company they would ''fuck us up.''

Carmen also testified that later on the same day, while at Edgemere Drive he saw strikers Greci and Renzi approach a company-owned truck which was about 60 to 70 feet away, make some hand motions and leave. According to Carmen, when he went over to the truck he noticed that the electrical switch used to raise and lower the truck body had been ripped out.

In relation to the first incident, Cruz testified that on one occasion he came on a truck driven by Carmen and that while he (Cruz) was talking to the replacements, Carmen came over, reminded Cruz of the beating he had earlier re-

ceived in 1986 and stated that he had better leave if he did not want to get hurt again.

I am not going to credit Donald Carmen as to these incidents. For one thing, he is an in-law of the owner and therefore is not a disinterested witness. Further, Carmen's testimony as to these incidents were not corroborated by any of the replacements who allegedly were with him when they occurred. Finally, in certain other aspects of his testimony (referred to below), Carmen's testimony was inconsistent with the testimony of witnesses who were supposed to corroborate his version of events.

John Odwazna, a nonstriking employee, testified that in late March 1988 while driving a truck, a car with four people in it including striker Larry Laster, impeded his progress by driving slowly in front of his truck. According to Odwazna, when a police car appeared the union car left, but when the police car departed the union car resumed its blocking activity. This was essentially corroborated by Michael Sheridan Donovan, a son-in-law of Sarah Allen. Donovan testified that during this episode, he saw one of the men in the union car giving out leaflets to stores that the company serviced.

In relation to the above incident, I credit the account of Odwazna and Donovan. Further I believe that they have sufficiently identified the actors so as to attribute responsibility to the Union. As I view this conduct as being analogous to cases involving obstructions of ingress and egress to company facilities, I conclude that this conduct is violative of Section 8(b)(1)(A) of the Act.

Frank Suozzo a replacement, testified that on or about March 24 a gray Buick driven by Business Agent Giamona drove up to him whereupon one of the passengers said, ''If you don't walk away we'll come to your home and kill you.'' (Suozzo identified one of the other passengers as striker Joe Nalley.) This transaction was denied by Giamona who claimed that he was in Florida at the time. Notwithstanding Giamona's denial, I felt that Suozzo was a credible witness. Accordingly, I conclude that the Union by the conduct described, violated Section 8(b)(1)(A) of the Act.

Where was testimony by Carmen that on or about March 24 while on a route with Walter Maislin, he saw strikers Renzi and Mitchell chasing Maislin. He testified that Dexter Mitchell (who is black), had a tire iron in his hand and that he heard Renzi yell that he would meet Maislin after work for a fight. (When asked to identify from the photographs, the person holding the tire iron, Carmen picked out Alexander Ham.)

As to the above incident, Maislin testified that when he was picking up the garbage, he was approached by two men, one white and one black. He states that he was asked if he was aware that there was a strike going on and that the black man said that he would kick Maislin's ass if he continued to work. According to Maislin, as he began walking to the truck which was 500 or 600 feet away, the white man brandished a tire iron and said that he better not work or he would kick his ass and kill him. In a pretrial affidavit, however, Maislin made no mention of a tire iron, an event I would think would be hard to forget. Moreover, if Maislin was as far away from the truck as he says he was, I cannot imagine how Carmen could have either seen or heard what took place. In short, I do not think that the General Counsel, as to this incident, has established her case by a preponderance of the evidence.

John Bretagna, a replacement, credibly testified that in March 1988, strikers Joe Nalley and Anthony Marino (and a bald man), asked him at Rick's Deli to sign a union card which he refused to do. According to Bretagna, as he was on his route later in the day, the three men followed his truck and Marino threatened to break his legs and burn his home. In my opinion this threat by the strikers while following Bretagna constituted a violation of Section 8(b)(1)(A) of the Act.

Bretagna testified that a few days after the Deli incident, he was followed by Mario Greci who was driving strikers Bruning, Pisan, and Renzi in his blue IROC. According to Bretagna they followed him into a dead end street and when he got out of his car the strikers blocked the exit and asked him to go out on strike with them. He states that they were there for about 5 or 10 minutes when Jackie Allen pulled up with John Dandola. Bretagna states that after the group broke up, Greci again followed him whereupon he pulled over and told Greci that if he did not stop following him he would burn Greci's car. In view of my finding above, that Bretagna had been threatened earlier by strikers who followed him, I conclude that the continued trailing of Bretagna also violated the Act.

I also credit Bretagna's testimony that on another occasion in March, he met Grisset at the dump and that Grisset threatened to cut Bretagna's face. While this incident occurred away from the picket line and involved Grisset whose position is ambiguous, I conclude that the Union, having enlisted and paid Grisset as a picket is responsible for his actions.

Michael Natow, a replacement, credibly testified that in late March 1988 as he was driving home with his girlfriend, he was followed by some of the strikers in the blue IROC (i.e., Mario Greci). Natow states that the driver threatened to kick his ass, which frightened his girlfriend. According to Natow, the IROC then swerved in front of his car and when he got off at the highway, the IROC followed. Natow testified that the driver made a threatening gesture and said ''I want you.'' According to Natow, after trying without success to lose the other car, he was approached by these people who said that he should not work at the company anymore or they would kick his ass. Natow says that he agreed not to work whereupon they shook hands and they left. From Natow's description it would seem likely that the other person present during this incident was Peter Bruning.

According to Natow, he nevertheless decided not to quit and he states that a few days later as he was leaving work, Grisset said that it would be pretty hard to keep the job with broken legs. This occurred, according to Natow, at the picket line.

In my opinion Natow was a credible witness and based on his testimony I conclude that in late March and early April 1988 the union violated Section 8(b)(1)(A) as it was legally responsible for the threats made to Natow by Greci and Grisset and that it was also responsible for the reckless manner in which Greci cut off Natow's vehicle on the Long Island Expressway.

Regarding the incident where Maislin backed up, broke the fence, and knocked John Allen to the ground, I do not think that either side can be charged with violating the Act. Although it appears from Maislin's testimony that striker Renzi yelled something which caused him to back up the driveway, Maislin could not testify what it was.

Biago Noia, a replacement, who I believe was a credible witness, testified that on one occasion (probably in early April), while on the East Williston route, he was followed by a car containing three white men and one black man. From the photographs in evidence, Noia identified three of these people as Kevin Pisan, Mario Greci, and Jerome Jackson. (Jackson is a business agent who is black.) According to Noia, after the three white men got out of the car, a tall blond man who was about 6 feet 3 inches (probably Bruning), said that he would be beaten up if he continued to work for the company. Based on this testimony I conclude that the Union violated Section 8(b)(1)(A) of the Act.

Karen Donovan, a daughter of Sarah Allen, testified that on or about April 11 (after videotaping the pickets), a large firecracker was thrown at her at the picket line. She also testified that on a later occasion in April a stone was thrown past her car as she passed the picket line. Unlike her brothers John and Daniel Allen, I was favorably impressed by the demeanor and credibility of Donovan as a witness. I therefore conclude that in these respects, the Union violated Section 8(b)(1)(A) of the Act.

There was credible testimony and I find that on about eight other occasions in April 1988 stones were thrown at cars of employees that were entering or leaving the company. Three of these incidents occurred between April 15 and 30 and the others occurred on undetermined dates in April. The stone throwing incidents occurred at the picket line and strikers Kevin Pisan and Dave Phillips were identified as throwers. I conclude that the Union is liable for the actions of its pickets and that it has violated Section 8(b)(1)(A) of the Act by permitting the pickets to throw stones at the cars of nonstriking employees.

John Bretagna testified that in April, as he was leaving the company's driveway, one of the pickets jumped in front of his car and claimed that Bretagna had tried to hit him. According to Bretagna, he was driving at about 3 mph when this happened after which the man grabbed onto his door while yelling at Bretagna. As I credit Bretagna, I conclude that a picket impeded Bretagna's egress from the company and attempted to provoke an incident by falsely claiming that Bretagna had tried to hit him. In my opinion, this constitutes a violation of Section 8(b)(1)(A) of the Act.

There was testimony by Daniel Allen concerning an incident in the third week of April. He testified that the side mirror of a vehicle driven by a replacement was damaged when the driver of vehicle behind it tried to go around the first car which had stopped at the picket line. Assuming this to be true, I do not see how the Union or the pickets were responsible for this.

On or about April 20 a convoy of the company's vehicles went to the gas station. According to Bretagna, Larry Laster blocked the entrance and prevented them from going into the gas station. Bretagna states that he got out of his car and with a bat, threatened Laster in an effort to get him to move. Bretagna states that Laster, with Grisset, then came over to his car and brandished a snow shovel in a threatening manner. With respect to this incident, I conclude that the blockading of the entrance to the gas station was violative of the Act. However, the actions of Bretagna, Laster and Grisset seem to me to be a standoff, and I shall not conclude that the Union violated the Act in relation to the actions of Laster and Grisset on this occasion.

The credible testimony of replacements Jaspers and Greco was that on or about April 22 they were followed by two men in a car, one of whom said that he was going to burn Greco's truck. As it turned out that the car in question was leased to Bruce Kapp, a union agent assigned to the strike, I conclude that the threat constituted a violation of Section 8(b)(1)(A) of the Act.

The evidence establishes that nails were found on the company's driveway during a three day period in May 1988. Given the other acts and conduct by the Union and the pickets, it is reasonable to conclude that the nails were not there by accident. I therefore conclude that the nails were deposited by persons connected with the union and that the union thereby violated Section 8(b)(1)(A) of the Act.

On August 10, 1988, Laster pulled out a piece of the company fence and threw it in the air. Although Andrea Allen testified that Laster threw the piece of wood at her, the testimony in toto indicates that Laster merely threw the piece of fence in the air without intending to hit anyone. Thus, while I shall not conclude that he attempted to assault anyone, I shall conclude that he damaged company property. As such, I conclude that the Union violated Section 8(b)(1)(A) of the Act.

There was testimony by John Allen concerning an incident on June 3 involving Dexter Mitchell and an incident on or about September 1, with Mike Renzi. As I have already concluded that the testimony of John Allen is unreliable, I shall not find any violations by the Union based on this testimony.

D. *The 8(b)(7)(C) Allegation*

The Union commenced its picketing on March 19, 1988, and filed a petition for an election on April 15. Thus although the picketing clearly had a recognitional object, the Union filed its petition within 30 days of the commencement of the picketing. Notwithstanding that fact, the company argues that because of the conduct of the Union detailed above, the Union picketed for more than a reasonable period of time as defined in Section 8(b)(7)(C) of the Act.

In *Retail Wholesale Union District 65 (Eastern Camera)*, 141 NLRB 991, 999 (1963), the Board stated:

> The Act does not define a reasonable period of time, but the language of the section as well as its legislative history indicates that picketing for a period less than 30 days may be considered as unlawful. Thus, it is apparent that congress intended that the Board should determine what constitutes a reasonable time in each case that the 30 day limitation was merely an outside limitation. We hold here, in view of Respondent's picket line acts, consisting, as set forth above, of threats of physical violence, use of coercive and abusive language, blocking ingress and egress to and from struck premises, that Respondent violated Section 8(b)(7)(C) of the Act by engaging in 26 days of recognitional and organizational picketing without filing a petition.
>
> Our holding in this respect is not without precedent. In *Cuneo v. United Shoe Workers (O.T. Shoe Mfg. Co.)*, which involved a petition for injunctive relief under Section 10(1), only 10 days elapsed between the commencement of the picketing and the filing of a petition for an election.

In *Eastern Camera* the Board explicitly adopted the rationale of the court in *Cuneo v. Shoe Workers (Q.T. Shoe)*, 181 F.Supp. 324 (D.C.N.J. 1960). The court in that case stated:

> The unlawfully aggressive nature of the picketing and its coercive effect on the employees have combined . . . to shorten the period for which the Union may reasonably be allowed to picket before seeking the impartial intervention of the Board.
>
> Under established Board policy the representation election will not be held until the effects on the employees of unlawful conduct on the part of the respondents have been dissipated. It would be anomalous to hold that respondents may picket until such times as a free election may be held, where respondents' unlawful conduct has precipitated the delay.

Over the years since *Eastern Camera* there have been very few cases interpreting what is meant by a reasonable period of time as defined by Section 8(b)(7)(C).[9] Recently in *Laborers Local 1184 (NVE Constructors)*, 296 NLRB 1325 (1989), the Board stated:

> In situations where an employer has employees, the Board has generally defined a ''reasonable period of time'' as 30 days, except in very limited circumstances, i.e., picketing accompanied by violence or other misconduct on the picket line, and picketing to secure recognition where the Act itself prohibits certification of the picketing union. The Board has also held that a union cannot picket for an agreement where the employer does not currently employ any employees in the unit sought.

Without intending to minimize the conduct of the Union's supporters found to be unlawful in the previous section, those actions during the initial 30 days of picketing of picketing, do not seem to me to be of such a nature that would warrant shortening the period of time that the Union may picket for recognition under Section 8(b)(7)(C) of the Act. Moreover, I have also concluded that the employer has, during this same period of time, committed similar types of unlawful misconduct. As such, I do not think that it would be accurate to state that the Union, by its conduct, was responsible for delaying the holding of a fair election.

E. *The 8(a)(5) Allegation*

As of March 19, 1988, when the Union demanded recognition, a majority of the employees had signed authorization cards designating the union to represent them. These cards explicitly permitted the union to bargain on their behalf and to seek recognition without an election. Moreover at the meeting where most cards were signed, the employees clearly expressed their intent to seek election not by way of an election but if necessary through the exercise of economic action (i.e., a strike). Thus, contrary to the employer's contention there is no doubt in my mind that the authorization cards signed by the employees were valid and that the union, as of March 19 represented a majority of the company's employees. *Levi Strauss & Co.*, 172 NLRB 732 (1968) enfd. sub nom. *Southwest Regional Joint Board v. NLRB*, 441 F.2d 1027 (D.C. Cir. 1970).

The crucial question here is whether under all the circumstances, the Union, notwithstanding that no election has been held, would be entitled to a bargaining order.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court distinguished between three categories of situations insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the ''exceptional'' case where ''outrageous'' and ''pervasive'' unfair labor practices are committed. The second category involves ''less pervasive practices'' that have a tendency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be proper to remedy an employer's unlawful conduct which had the effect of making a fair election unlikely where at some point the Union had majority support amongst the employees. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a ''minimal impact'' on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices.

The present case seems to fall within either the second or third category as I do not view this as the ''exceptional'' case involving ''outrageous'' practices. (On the other hand, it seems to me that the employer's conduct could easily be described as ''pervasive.'')

Reasonable people may differ as to whether a series of unlawful acts will have the effect of making a fair election unlikely. For example, in *NLRB v. Pace Oldsmobile*, 739 F.2d 108 (2d Cir. 1982), the court refused to enforce a bargaining order based on employer unfair labor practices which included promises of medical benefits, threats to withdraw benefits, threats to close the plant, the discharge of employees, interrogations and the refusal to reinstate five strikers. The court noted that despite the unlawful conduct, the union nevertheless obtained sufficient support after the conduct to conduct a strike against the employer. This fact in the court's view, undermined the contention that a fair election was ''improbable if not impossible.''

In *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989), it appears that the Board has adopted the rationale of the court in *NLRB v. Pace Oldsmobile*, supra, regarding the timing of an employer's unlawful conduct. Thus, the Board stated:

> We realize that the original threats of plant closure . . . occurred . . . prior to the employees signing authorization cards for the Union. Indeed, as the judge noted, ''the employees went to the Union hall en masse, spontaneously, as a result of Kobialka's speech a few minutes earlier in which he threatened them with plant closure and massive layoffs.'' And there is evidence that Kobialka's speech may have caused some employees who before were not in favor of the Union to change their minds . . . . Thus it can not be said that these initial threats in fact nullified majority support for the Union. However, these threats were not the only unfair labor practices committed by the Respondent. Threats of this nature and additional unfair labor practices, including 8(a)(3) violations, were committed by the Re-

[9] See for example *Mine Workers District 12 (Truaz-Traer Coal)*, 177 NLRB 213 (1969).

> spondent after the signing of the authorizations cards and the strike occurred . . . . Clearly this unlawful conduct tended to undermine support for the Union and to extinguish any vestige of employee defiance that may have survived the Respondent's initial unfair labor practices . . . . Thus, notwithstanding that the initial threats of plant closure did not destroy employee support for the Union, we conclude that the Respondent's latter violations not only evidence the Respondent's continuing resolve to retaliate against the employees for their union activities but serve to render slight the likelihood that a free election can now be conducted.

In the present case the employer contends that even if it engaged in certain unlawful conduct, the Union's unlawful conduct should preclude the granting of a bargaining order. In this regard the Board, in *Laura Modes Co.*, 144 NLRB 1592 (1963), held that a union's pervasive use of violent tactics precluded the granting of a bargaining order that might otherwise have been warranted by the employer's unlawful conduct.

In *Fairview Convalescent Home*, 206 NLRB 688, 689 (1973), enfd. 520 F.2d 1316 (2d Cir. 1975), the Board stated:

> We do not condone any picket line violence and the processes of the Board are available to prevent its recurrence . . . . But we are also reluctant to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants. Here, looked at in perspective, there were but a few instances of misconduct by a relatively small proportion of strikers . . . against a background of Respondent's frequent and recurring unfair labor practices. Viewed in that light . . . we have concluded that the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order would not best effectuate the policies of the Act.

In *Grede Foundries*, 235 NLRB 36 (1978), the administrative law judge noted that the Board in a number of cases, has relied on the following factors: the extent of the Union's interest in pursuing legal remedies, the extent to which the evidence shows deliberate planning of violence and intimidation of the part of the Union, the extent to which the assaults or other misconduct were provoked, the duration of the Union's conduct and the relative gravity of the Union's misconduct vis-a-vis the employer's misconduct. (I note that unlike the other cited cases Maywood involved an incumbent union and the issue was whether the employer could withdraw recognition based on a claim that it had a good-faith doubt as to the union's continued majority status.)

In *Massachusetts Coastal Seafoods*, supra, the Board granted a remedial bargaining order notwithstanding union misconduct. In that case the Board held that the employer had engaged in extensive unfair labor practices which continued from the outset of the organizational campaign until after an election and after a strike had ended. The unfair labor practices consisted inter alia of the wholesale discharge of strikers, threats to close the plant, threatened loss of jobs, promised wage increases, warnings of the futility of selecting a union, and the implementation of retaliatory work practices. On the other hand the Board noted that the Union demonstrated an interest in pursuing legal recourse by filing an election petition and unfair labor practice charges; that there was only one misconduct incident directly attributable to the union; that sporadic misconduct by individual strikers was not part of a deliberate plan to intimidate employees; and that the strikers misconduct was not as serious as the employer's unfair labor practices.

After the Union demanded recognition and the strike commenced, and until the offer to return to work in October 1988, I count 18 incidents where the company, principally by John Allen, violated the Act. In the main, these violations consisted of a few minor assaults, threats of assault to persons and property, threats of discharge and 5 or 6 occasions of reckless driving. In their totality, I would tend to conclude that this was serious misconduct by the employer.

On the other hand, I count about 18 incidents of union misconduct in relation to the strike. Included in this conduct, were 8 separate occasions of stone throwing, reckless driving by Greci, threats of physical harm to striker breakers, and instances of blocking ingress and egress. Indeed it seems to me that in this case, the Union's misconduct is almost the mirror image of the employer's misconduct. Thus, one could say that for virtually every occasion that the employer gave a push, the union came back with a shove.

The test here is whether the employer's unlawful conduct made a fair election improbable. Simply put, I think it is impossible to determine which side tainted the holding of a fair election. In my opinion, both the union and the employer engaged in similar conduct during the 7 months before the union offered to end the strike. And in these circumstances I do not believe that a bargaining order would be warranted.

F. *Reinstatement of Strikers*

On October 26, 1988, Eugene Eisner, counsel for Local 813 wrote to the company as follows:

> On behalf of my client, Private Sanitation Union, Local 813, it is hereby offered on behalf of all striking employees that they return to work immediately and unconditionally.

Instead of offering reinstatement to the strikers, the company on October 27, 1988, initially asked the Union to provide the names and addresses of the strikers and stated that the company was prepared to take ''appropriate steps so as to assure an orderly transition for those striking employees who wish to immediately return to work.''

On October 31, the Union by its attorney, reiterated the offer on behalf the strikers to return to work. It also set forth the names of the strikers.

On November 1, the company responding to the Union's October 31 letter, stated that since it was contesting the Union's representative status, it would ''give appropriate consideration to those written requests which it may come to receive from individual striking employees.''

On November 9, the Union once again restated the offer on behalf of the strikers to return to work.

On November 28, Sarah Allen on behalf of the company, sent a letter to the Union's attorney questioning the validity of the Union's earlier offers to return to work and stating that the company would not reinstate anyone unless it received from each striker a request for reinstatement.

On December 21 (now almost 2 months after the Union made an offer to return to work), the company sent a letter to the strikers, which instead of offering them reinstatement, required them to state in writing within 5 days if they in fact, were interested in returning to work.

It was not until January 12, 1989, that the company made what purports to be its first offers of reinstatement when it sent letters to strikers Bruning, Bruton Cranmer, Donovan, Farrel, Fells, Furline, Greci, Ham, Harris, Laster, Lettis, Marino, Mitchell, Nalley, Phillips, Pisan, Renzi, Semonella, and Wesselhoft. Nevertheless, although stating that the letter ''shall serve to confirm that you are hereby unconditionally offered reinstatement.'' it is obvious from the context that nothing of the sort was intended. Instead, the real object of this letter was to solicit from the strikers written statements as to whether they in fact desired reinstatement. Moreover, this letter and the follow up letter on January 31, did not set forth any time to report to work and in that respect was an ''offer'' without substance. (In fact, another month went by before the company made any tangible offers of reinstatement to any of the strikers.)

On February 11, 1989, the company made its first real offers of reinstatement to any of the strikers, when it sent mailgrams to Kevin Pisan and Ralph Semonella stating that they should report to work on February 17.

The General Counsel contends that the strike was caused or at least prolonged by the employer's unfair labor practices. This contention does not really have any practical meaning in the context of this case, as there was no contention by the employer that the strikers were permanently replaced. Where a company asserts that there have been replacements which thereby preclude the reinstatement of economic strikers, the company has the burden of proving that the replacements are in fact permanent replacements. *NLRB v. Murray Products*, 584 F.2d 934 (9th Cir. 1978). See also *ZaPex Corp.*, 235 NLRB 1237, 1240 (1978), holding that the burden of proof is on the employer to show that strikers had been permanently replaced and that the hiring of temporary replacements does not excuse the employer's refusal to reinstate economic strikers who make an unconditional offer to return to work.

In any event, while I think that the strike started out as an economic strike, in furtherance of the Union's demand for recognition, I would conclude that by April 1988, the strike had been converted, at least in part, into an unfair labor practice strike. *Teamsters Local 662 v. NLRB*, 302 F.2d 908 (D.C. Cir. 1962). Thus, a strike which is caused or prolonged by an employer's unfair labor practice, even in part, is an unfair labor practice strike which entitles the striking employees to immediate reinstatement to their former positions of employment, or if such are not available, to substantially equivalent positions on their unconditional offers to return, even where the employer is required to terminate permanent strike replacements in order to make jobs available to the strikers. That a strike may also be motivated by economic considerations is irrelevant. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Teamsters Local 662 v. NLRB*, 302 F.2d 908 (D.C. Cir. 1962); *Workroom For Designers*, 274 NLRB 840, 856 (1985).

Even if the strike continued to be an economic strike an unconditional offer to return to work would trigger certain obligations on the employer's part to reinstate the strikers. In *Bralco Metals*, 227 NLRB 973, 977 (1977), the Board citing *Laidlaw Corp.*, 171 NLRB 1366 (1968), set forth the basic rule relating to economic strikers and their rights to reinstatement as follows:

> It is well settled that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements remain employees and are entitled to full reinstatement on departure of replacements, unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain its burden on proof that the failure to offer full reinstatement was for legitimate and substantial business justification.

It is also well settled that a Union may, on behalf of strikers, make an unconditional offer to return to work. As such, the employer in this case, was not free to withhold offers of reinstatement because of its contention that it did not believe that the Union was authorized to make the offers to return to work. *Workroom For Designers*, supra at 861; *Matlock Truck Body Corp.*, 248 NLRB 461 (1980).

In the present case, I conclude that the Union on October 26, 1988, made a valid request, on behalf of the strikers to return to work. I also conclude that the company did not make any valid offers of reinstatement until February 11, when it sent mailgrams to Kevin Pisan and Ralph Semonella. As it is clear to me that there were jobs available for some, if not all the strikers, during the period after October 26, 1988, I conclude that the employer's failure to make any valid offers of reinstatement for almost 4 months constituted a violation of Section 8(a)(3) of the Act. In this regard, I conclude that all the strikers were in effect discharged as of October 26, and that backpay for them should run from the date of the unconditional offer to return to work. *NLRB v. Acme Wire Works*, 582 F.2d 153 (2d Cir. 1978). I would however leave to compliance the determination of individual backpay which might be affected by among other things, the number of available jobs during any given period of time. Thus, for example, while concluding that the 8(a)(3) violation commenced on October 26 for all the strikers, it may be that on that date there was work only for 10 persons. In that instance, it would have to be determined whether any of the strikers would be entitled to job preference, or in what manner backpay should be divided amongst the available strikers. Also relevant for purposes of determining the extent of backpay would be whether particular strikers obtained permanent employment elsewhere.

With respect to the issue of striker reinstatement, I also make the following conclusions:

1. Apart from Kevin Pisan, the employer did not contend that any of the other strikers should not be eligible for reinstatement or backpay on account of strike misconduct. Therefore I conclude that this should not be an issue in this or any compliance proceeding. See *Colonial Press*, 207 NLRB 673 (1973), on the issue of condonation.

2. As to Kevin Pisan, the evidence shows that he was offered reinstatement on February 11, 1989, but that this offer was withdrawn based on the employer's assertion that Pisan made telephone threats to John Allen. In this instance, as the employer has established a good faith belief that it was Pisan who made the threats, the burden shifted to the General

Counsel to establish that Pisan did not in fact, engage in the alleged conduct. *U.S. Gypsum*, 284 NLRB 4 (1987); *GSM, Inc.*, 284 NLRB 174 (1987). Because I do not view that threat as minimal and as Pisan did not deny the conduct, I shall conclude that the employer validly refused to reinstate him after the threat was made. *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

3. D'Angelo Grisset was not an employee of the company at the time that the strike commenced. Therefore the fact that he engaged in strike and picket line activity does not mean that he is entitled to reinstatement or backpay.

4. On December 27, 1988, James Talton informed the company in writing that he did not desire reinstatement. Although there had not been a valid offer of reinstatement to any of the employees, I would view Talton's letter as tantamount to a withdrawal, on his part, of the offer to return to work.

5. As of the last day of the hearings in this case, no offers of reinstatement had been made to Larry Laster and Dexter Mitchell. There is, therefore, no evidence to show that backpay for them had been terminated by any valid offers of reinstatement. Of course, the employer would be permitted to show at the compliance stage of this case, that it did make valid subsequent offers.

THE REMEDY

I have concluded above that both respondents have violated the Act and it therefore will be recommended that they cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

I have also concluded that by failing and refusing to reinstate strikers in a timely fashion after they offered to return to work, the employer has violated Section 8(a)(1) and (3) of the Act. To the extent that such strikers have not already been offered reinstatement, the respondent shall offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. As to all strikers, it shall be recommended that the employer make them whole for any losses they may have suffered by reason of the discrimination against them from October 26, 1988, until such times as valid offers of reinstatement are or were made to each of them. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Isis Plumbing Co.*, 138 NLRB 716 (1962), with interest in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

In view of my further conclusion that the employer has violated the Act in the past and therefore has demonstrated a proclivity for illegal conduct, I shall recommend that a broad order be issued. *Hickmott Foods*, 242 NLRB 1357 (1979).

CONCLUSIONS OF LAW

1. The Respondent, Daniel Finley Allen & Co., Inc., has interfered with, restrained, and coerced its employees and has engaged in conduct in violation of Section 8(a)(1) of the Act by the following conduct:

(a) By threatening to discharge employees or to sell the business if the employees selected the Union as their bargaining representative.

(b) By threatening to discharge employees if they engaged in a strike.

(c) By promising benefits to employees if they abandoned the strike.

(d) By attempting to bypass the union and deal directly with employees.

(e) By telling employees that the company would never sign a contract with the Union, thereby indicating that it would be futile for them to select the Union as their bargaining representative.

(f) By threatening to assault or kill employees or their families.

(g) By threatening to assault union representatives in the presence of employees.

(h) By threatening to cause damage to the cars, homes or other property of employees or their families.

(i) By attempting to provoke fights with employees or union representatives in the presence of employees.

(j) By assaulting employees, or union representatives in the presence of employees.

(k) By bumping into, spitting at, throwing coffee at, or throwing garbage at employees, union representatives or other persons in the presence of employees.

(l) By driving vehicles in a reckless manner so as to threaten physical harm to employees or union representatives.

(m) By grabbing hold of and taking away property belonging to union representatives and employees.

2. The strike which commenced on March 19, 1988, was converted to an unfair labor practice strike in or about April 1988.

3. The employer has discriminated against its employees in order to discourage their involvement in union activities, in violation of Section 8(a)(3) and (1) of the Act by failing and refusing to properly and timely reinstate strikers on their unconditional application for reinstatement.

4. Except as noted above, the employer did not violate the Act in any other manner.

5. The Respondent, Private Sanitation Union, Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO has engaged in conduct violative of Section 8(b)(1)(A) of the Act in the following manner:

(a) By blocking the progress of company vehicles driven by nonstriking employees and supervisors.

(b) By making threats to kill, to break legs, or to otherwise cause bodily injury to nonstriking employees.

(c) By throwing firecrackers and by throwing stones at the vehicles of nonstriking employees and supervisors in the presence of employees.

(d) By placing nails in the company's driveway.

(e) By trying to provoke fights with nonstriking employees.

(f) By threatening to burn or otherwise cause damage to the cars or other property of nonstriking employees.

(g) By driving vehicles in a reckless manner so as to constitute threats of injury to nonstriking employees.

(h) By following the vehicles of nonstriking employees in conjunction with threats to such persons.

(i) By damaging the property of the employer and employees.

6. The Union has not violated the Act in any other manner.

The acts of both Respondents affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

A. The Respondent, Daniel Finley Allen & Co., Inc., Hicksville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees or selling the business if employees select the Union as their bargaining representative.

(b) Threatening to discharge employees if they engage in a strike.

(c) Promising benefits to employees if they abandon a strike.

(d) Attempting to bypass the Union and deal directly with employees.

(e) Telling employees that the company would never sign a contract with the Union and thereby indicating that it would be futile for them to select the Union as their bargaining representative.

(f) Threatening to assault or kill employees or their families.

(g) Threatening to assault union representatives in the presence of employees.

(h) Threatening to cause damage to the cars, homes or other property of employees or their families.

(i) Attempting to provoke fights with employees or union representatives in the presence of employees.

(j) Assaulting employees or union representatives in the presence of employees.

(k) Bumping into, spitting at, throwing coffee at, or throwing garbage at employees, union representatives or other persons in the presence of employees.

(l) Driving vehicles in a reckless manner so as to threaten physical harm to employees or union representatives.

(m) Grabbing hold of and taking away property belonging to union representatives and employees.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent that it has not already offered reinstatement to the strikers, offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole all the strikers for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility copies of the attached notice marked ''Appendix 1.''[11] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Employer's authorized representative, shall be posted by it immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, Private Sanitation Union, Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and helpers of America, AFL–CIO, New York, New York, its officers, agents, and representatives shall

1. Cease and desist from

(a) Blocking the progress of company vehicles driven by nonstriking employees and supervisors.

(b) Making threats to kill, to break legs, or to otherwise cause bodily injury to nonstriking employees.

(c) Throwing firecrackers and by throwing stones at the vehicles of nonstriking employees and supervisors in the presence of employees.

(d) Placing nails in the company's driveway.

(e) Trying to provoke fights with nonstriking employees.

(f) Threatening to burn or otherwise cause damage to the cars or other property of nonstriking employees.

(g) Driving vehicles in a reckless manner so as to constitute threats of injury to nonstriking employees.

(h) Following the vehicles of nonstriking employees in conjunction with threats to such persons.

(i) Damaging property belonging to the employer or to employees.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices copies of the attached notice marked ''Appendix 2.''[12] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Union's authorized representative, shall be posted by the Union immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by the employer, if willing, at all places where notices to employees are customarily posted.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[12] See fn. 11, supra.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

APPENDIX 2

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT block the progress of company vehicles driven by nonstriking employees and supervisors.

WE WILL NOT make threats to kill, to break legs, or to otherwise cause bodily injury to nonstriking employees.

WE WILL NOT throw firecrackers at supervisors or throw stones at the vehicles of nonstriking employees and supervisors in the presence of employees.

WE WILL NOT place nails in the Company's driveway.

WE WILL NOT try to provoke fights with nonstriking employees.

WE WILL NOT threaten to burn or otherwise cause damage to the cars or other property of nonstriking employees.

WE WILL NOT drive vehicles in a reckless manner so as to threaten physical harm to nonstriking employees.

WE WILL NOT follow the vehicles of nonstriking employees in conjunction with threats to such persons.

WE WILL NOT damage property belonging to the employer or to employees.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

PRIVATE SANITATION UNION LOCAL 813, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO